

access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(5) Testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service, the disclosure of which would compromise the objectivity or fairness of the testing or examination process; or

(6) Evaluation material used to determine potential for promotion in the armed services, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

(b) Each notice of a system of records that is the subject of an exemption under 5 U.S.C. 552a(k) will include a statement that the system has been exempted, the reasons therefore, and a reference to the **Federal Register**, volume and page, where the exemption rule can be found.

(c) The systems of records to be exempted under section (k) of the Act, the provisions of the Act from which they are being exempted, and the justification for the exemptions, are set forth in paragraphs (c)(1) through (3) of this section:

(1) *Criminal Law Enforcement Records*. If the 5 U.S.C. 552a(j)(2) exemption claimed under § 215.13(c) of this chapter and on the notice of systems of records to be published in the **Federal Register** on this same date is held to be invalid, then this system is determined to be exempt, under 5 U.S.C. 552(a) and (k)(1) and (2) of the Act, from the provisions of 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G) through (I), and (f). The reasons for asserting the exemptions are to protect the materials required by executive order to be kept secret in the interest of the national defense or foreign policy, to prevent subjects of investigation from frustrating the investigatory process, to insure the proper functioning and integrity of law enforcement activities, to prevent disclosure of investigative techniques, to maintain the ability to obtain necessary information, to fulfill commitments made to sources to protect

their identities and the confidentiality of information and to avoid endangering these sources and law enforcement personnel.

(2) *Personnel Security and Suitability Investigatory Records*. This system is exempt under U.S.C. 552a(k)(1), (2), and (5) from the provisions of 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G) through (I), and (f). These exemptions are claimed to protect the materials required by executive order to be kept secret in the interest of national defense or foreign policy, to prevent subjects of investigation from frustrating the investigatory process, to insure the proper functioning and integrity of law enforcement activities, to prevent disclosure of investigative techniques, to maintain the ability to obtain candid and necessary information, to fulfill commitments made to sources to protect the confidentiality of information, to avoid endangering those sources and, ultimately, to facilitate proper selection or continuance of the best applicants or persons for a given position or contract. Special note is made of the limitation on the extent to which this exemption may be asserted.

(3) *Litigation Records*. This system is exempt under 5 U.S.C. 552(k)(1), (2), and (5) from the provisions of 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G) through (I), and (f). These exemptions are claimed to protect the materials required by executive order to be kept secret in the interest of national defense or foreign policy, to prevent subjects of investigation from frustrating the investigatory process, to insure the proper functioning and integrity of law enforcement activities, to prevent disclosure of investigative techniques, to maintain the ability to obtain candid and necessary information, to fulfill commitments made to sources to protect the confidentiality of information.

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DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 201, 203, and 206

[Docket No. FR-6084-F-02]

RIN 2502-AJ43

Acceptance of Private Flood Insurance for FHA-Insured Mortgages

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing

Commissioner, Department of Housing and Urban Development (HUD).

ACTION: Final rule.

SUMMARY: This final rule amends Federal Housing Administration (FHA) regulations to allow mortgagors the option to purchase private flood insurance on FHA-insured mortgages for properties located in Special Flood Hazard Areas (SFHAs), in satisfaction of the mandatory purchase requirement of the Flood Disaster Protection Act of 1973 (the FDPA). The FDPA, as amended, requires the owner of a property mapped in a SFHA, and located in a community participating in the National Flood Insurance Program, to purchase flood insurance as a condition of receiving a mortgage backed by the Government Sponsored Entities (GSEs), Department of Veterans Affairs (VA), U.S. Department of Agriculture (USDA), or Federal Housing Administration (FHA). In consideration of public comments, HUD's experience implementing the program, and HUD's goals of aligning with the Biggert-Waters Act while mitigating risk and protecting taxpayers' funds, this final rule adopts HUD's November 23, 2020, proposed rule with minor changes.

DATES: *Effective date:* December 21, 2022.

FOR FURTHER INFORMATION CONTACT:

Elisa Saunders, Director, Office of Single Family Program Development, Office of Housing, Department of Housing and Urban Development, 451 7th Street SW, Room 9184, Washington, DC 20410-8000; telephone number 202-708-2121 (this is not a toll-free number). HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech and communication disabilities. To learn more about how to make an accessible telephone call, please visit <https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs>.

SUPPLEMENTARY INFORMATION:

I. Background

National Flood Insurance Program Statutory Framework and the Biggert-Waters Act of 2012

The National Flood Insurance Act of 1968 (the 1968 Act) and the FDPA, as amended, govern the National Flood Insurance Program (NFIP).¹ The 1968 Act makes federally backed flood insurance available to owners of improved real estate or manufactured

¹ See Public Law 90-448 (1968); Public Law 93-234 (1973). These statutes are codified at 42 U.S.C. 4001 *et seq.*

homes located in special flood hazard areas (SFHAs) if their community participates in the NFIP.

Until the adoption of the FDPA in 1973, the purchase of flood insurance was voluntary. Section 102 of the FDPA made the purchase of flood insurance mandatory. Specifically, it provides that no Federal officer or agency may approve any financial assistance for acquisition or construction² in any area identified as having SFHAs and in which the sale of flood insurance has been made available under the 1968 Act, unless the building or mobile home and any personal property is covered by flood insurance. The National Flood Insurance Reform Act of 1994³ (Reform Act) requires the owner of a property located in a community participating in the NFIP, and mapped in a SFHA, to purchase flood insurance as a condition of receiving a mortgage backed by the Federal National Mortgage Association (Fannie Mae) or the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, the government-sponsored enterprises or GSEs), VA, USDA, or FHA.

The Biggert-Waters Flood Insurance Reform Act of 2012, amended in 2014, (Biggert-Waters Act)⁴ further amended the Federal flood insurance statutes to encourage private-sector participation. However, it does not impose requirements on FHA-insured loans. The Biggert-Waters Act requires the Federal entities for lending regulation (the Federal Reserve Board (FRB), the Federal Deposit Insurance Corporation (FDIC), the Office of the Comptroller of the Currency (OCC), the National Credit Union Administration (NCUA), and the Farm Credit Administration (FCA), and collectively, Federal regulators), to direct lenders to accept private flood insurance to satisfy the mandatory purchase requirement, instead of NFIP insurance, if the private flood insurance meets the conditions defined further in the statute at 42 U.S.C. 4012a(b)(7). In addition, the Biggert-Waters Act also requires Federal agency lenders and the GSEs to accept private flood insurance, as defined by the statute. The Biggert-Waters Act also mandates that federally regulated lenders, Federal agency lenders, and lenders who sell to or service loans on behalf of the GSEs must accept private flood insurance policies that meet the definition of “private flood insurance” in the Biggert Waters Act as satisfaction of mandatory

purchase and flood insurance coverage requirements under the FDPA.⁵ On February 20, 2019, the Federal regulators jointly issued a final rule, published at 84 FR 4953 in the **Federal Register**, implementing the private flood insurance provisions of the Biggert-Waters Act. For more information on the statutory framework for NFIP, see HUD’s proposed rule published at 85 FR 74630 on November 23, 2020.

HUD’s Proposed Rule

On November 23, 2020 (85 FR 74630), HUD proposed to amend FHA regulations at 24 CFR parts 201, 203, and 206, to allow owners the option to purchase private flood insurance on FHA-insured mortgages for properties located in SFHAs, consistent with the FDPA and in harmony with private flood insurance requirements under the Biggert-Waters Act. As explained in the proposed rule, mortgagee’s acceptance of private flood insurance policies would provide borrowers with more flood insurance choices, promote consistency with industry standards, reduce the regulatory restrictions on flood insurance for FHA-insured loans, and harmonize FHA policies with the congressional intent expressed in the Biggert-Waters Act to encourage an expanded private flood insurance market.

HUD’s proposed rule included a provision with a compliance aid designed to help mortgagees evaluate whether a flood insurance policy meets HUD’s definition of “private flood insurance.” HUD’s proposal provided, however, that a mortgagee may make its own determination and choose not to rely on this statement and that the provision would not relieve a mortgagee of the requirement to accept a policy that both meets the definition of “private flood insurance” and fulfills the flood insurance coverage requirement, even if the policy does not include the compliance aid statement. In other words, this provision would not permit mortgagees to reject policies solely because they are not accompanied by the compliance aid statement. Mortgagees that are regulated lending institutions may seek additional compliance aids on the policy.

HUD’s proposed rule also sought public input on specific aspects of HUD’s proposal. HUD sought public comment on whether FHA regulations should state that a mortgagee may accept a qualifying private flood insurance policy in lieu of an NFIP policy or that a mortgagee must accept a qualifying private flood insurance

policy in lieu of an NFIP policy. Additionally, HUD sought public feedback on its proposed compliance aid. Specifically, HUD sought public comment on the language and option for the proposed HUD compliance aid for private flood insurance policies to demonstrate compliance with HUD’s definition and requirements for private flood insurance.

HUD noted that its proposed rule differed from the Federal regulators’ rule, published in the **Federal Register** at 84 FR 4953 on February 20, 2019, in several ways. Both rules offer a compliance aid to help mortgagees evaluate whether a flood insurance policy meets the definition of “private flood insurance.” However, as explained in HUD’s proposed rule, HUD’s compliance aid differs from the Federal regulators’ compliance aid provided in their final rule. HUD explained that this is due to differences in authorities governing the Federal regulators and FHA. The Federal regulators rely on the governing authority of the Biggert-Waters Act, which does not cover FHA. Additionally, unlike the Federal regulators’ joint rule, HUD did not propose to permit Mortgagees to exercise their discretion to accept flood insurance policies, provided by private insurers or mutual aid societies, that do not meet the definition and requirements for a private flood insurance policy as laid out in HUD’s proposed rule. As stated in HUD’s proposed rule, due to the differences between HUD’s and the Federal regulators’ rules, compliance with the Federal regulators’ final rule should not be interpreted as compliance with HUD’s requirements.

II. Changes Made at the Final Rule Stage

In consideration of the public comments, HUD’s experience implementing the program, and HUD’s goals of aligning with the Biggert-Waters Act while mitigating risk and protecting taxpayers’ funds, this final rule adopts with minor changes HUD’s proposal published on November 23, 2020 (85 FR 74630). What follows is a summary of HUD’s changes to 24 CFR parts 201, 203, and 206 made by this final rule. See HUD’s proposed rule for more detailed information.

§ 201.28 Flood and Hazard Insurance, and Coastal Barriers Properties

HUD revises § 201.28 to better align it with the requirements of 42 U.S.C. 4012a(a) and §§ 203.16a and 206.45. Specifically, the revision adds a reference to the statutory requirements

² Defined at 42 U.S.C. 4003(a)(4).

³ Title V of the Riegle Community Development and Regulatory Improvement Act of 1994, Public Law 103–325 (1994).

⁴ Public Law 112–141 (2012).

⁵ See *id.*

for community participation in NFIP and NFIP's availability in that community. HUD is adding this language to ensure that prospective homeowners seeking homes in communities that do not participate in NFIP are aware that they will not be able to obtain a private flood insurance policy and still meet FHA insurance requirements. In addition, HUD is adding language to clarify that lenders may rely on the compliance aid statement as provided in § 203.16a(c).

§ 203.16a Mortgagor and Mortgagee Requirement for Maintaining Flood Insurance Coverage

This final rule makes two changes to § 203.16a as proposed. Initially, the final rule adds § 203.16a(a)(1)(iii), and addresses the applicability of § 203.16a if a mortgage is to cover property improvements that are not otherwise covered by the flood insurance standard for condominium projects established under § 203.43b(d)(6)(iii) or (i)(1). HUD makes this technical change for clarity given the scope of properties that may constitute a condominium project.

Second, HUD's proposed rule at § 203.16a(d) stated that flood insurance must be maintained during such time as the mortgage is insured in an amount at least equal to the lowest of three possible amounts, consistent with the statutory requirements in Section 102 of the FDPA. One option proposed by paragraph (d)(1) of this section was to use the statutory language providing for coverage in an amount equal to the "Development or project cost less estimated land cost." This final rule revises paragraph (d)(1) to clarify the meaning of "Development or project cost less estimated land cost". HUD is now providing that paragraph (d)(1) is an amount equal to "100 percent replacement cost of the insurable value of the improvements, which consists of the development or project cost less estimated land cost." This language is codified in HUD's Home Equity Conversion Mortgage (HECM) regulations at § 206.45(c)(3)(i). This final rule makes this technical change for clarity and consistency and alignment with HECM regulations.

§ 206.45 HECM Requirements for Private Flood Insurance Coverage

This final rule makes several minor revisions to § 206.45 as proposed. Initially, HUD is adding a restatement of the definition and requirements for flood insurance to § 206.45. HUD is also revising § 206.45(c)(2) to add for HECM mortgages the loss payee and compliance aid language that is in § 203.16a(c). This final rule adds

paragraph (c)(4) to § 206.45 to restate the definition of private flood insurance in § 203.16a(e). HUD is amending § 206.45 by replacing the cross references to the definition in § 203.16a with cross references to § 206.45(c)(4). HUD has determined that greater clarity can be achieved by keeping private flood insurance requirements related to HECM in part 206. Additionally, this increases consistency between HECM and forward-facing mortgage regulations and affords the same benefits to both HECM and forward-facing mortgage mortgagors.

Second, similar to § 203.16a(a)(1)(iii), this final rule adds a paragraph to § 206.45. Under this new paragraph (c)(1)(i)(C), the requirements of § 206.45(c) apply if a mortgage is to cover property improvements that are not otherwise covered by the flood insurance standard for condominium projects established under § 203.43b(d)(6)(iii) or (i)(1). HUD makes this technical change for consistency within HUD's regulations and clarity given the scope of properties that may comprise a condominium project.

Finally, this final rule reorganizes the text of § 206.45(c)(1) into new paragraphs (c)(1) and (2) for clarity and structural consistency with § 203.16a and adds a header to paragraph (c)(3).

III. The Public Comments

The public comment period for the November 23, 2020, proposed rule closed on January 22, 2021. HUD received 31 (thirty-one) public comments in response to the proposed rule from brokers, homeowners, mortgagees, insurance agents, first-time home buyers, FHA borrowers, non-profit organizations, and other interested parties. This section presents the significant issues, questions, and suggestions submitted by public commenters, and HUD's responses to these issues, questions, and suggestions.

General Support and Benefits of HUD's Proposed Rule

Many commenters supported HUD's proposal to permit FHA borrowers to purchase private flood insurance. Many commenters cited how the proposed rule would save homeowners money, increase affordability and options for buyers, and offer broader insurance coverage at a lower price. Some commenters urged HUD to move forward with a final rule as soon as possible for FHA borrowers to realize the intended benefit.

One commenter noted that COVID-19 has presented obstacles of its own and the proposed rule will help families save money during the pandemic.

HUD Response: HUD appreciates the feedback and is publishing this rule to align with the intention of the Biggert-Waters Act. This rule allows borrowers the option to purchase private flood insurance in lieu of an NFIP policy, where flood insurance is required. Private flood insurance policies might offer borrowers greater coverage, less expensive rates, and lower deductibles.

Comments: Private Insurance Is Less Expensive and Offers More Coverage

Many commenters stated that Federal flood insurance policies are significantly more expensive than private insurance. Moreover, commenters stated that private insurance offered more coverage for lower premiums. One commenter stated that they considered refinancing their home into a conventional loan so they could buy private insurance because of the price of Federal flood insurance policies. Another commenter quoted the premium they received for Federal flood insurance at \$5,500 with a \$2,000 deductible, compared to the premium for private insurance at \$1,100 with a \$1,000 deductible for the same coverage. One commenter stated that even though their home has not had a flood in about 70 years the premiums for required insurance are "still insanely high." Other commenters stated that each year the cost of Federal flood insurance continues to rise significantly. These commenters generally agreed that private flood insurance would help low to middle income families save money, expand homeownership to first time homeowners, and help homeowners stay in their homes rather than having to sell because of expensive NFIP flood insurance. Another commenter said that because private flood insurance typically provides more coverage than an NFIP policy, it is less likely that FHA insurance will be required after floods.

HUD Response: HUD is encouraged that borrowers will be offered greater choice in selecting a flood insurance policy, which will reduce differences between FHA-insured mortgages and other mortgage options, while maintaining fiscal responsibility to FHA borrowers and taxpayers.

The range of flood insurance rates and deductibles varies greatly based on the characteristics of each property. A private flood insurance policy might allow some borrowers to obtain a less expensive policy.

Comments: Offering Private Insurance Promotes Affordability and Buying Options and May Expand the Flood Insurance Market

Commenters stated that private flood insurance is more affordable and gives more individuals and families the opportunity to own or refinance homes, along with the ability to save money. For example, allowing private flood insurance for FHA-insured loans will give more consumers who do not have “extra funds to afford the current flood insurance premiums” the opportunity to become homeowners. One commenter stated that FHA-insured loans are supposed to represent “affordable housing.” The commenter continued, however by stating that borrowers are forced to get Federal flood insurance policies through FEMA which are double the cost of private flood insurance and which prohibit many prospective homeowners from buying due to costs. Another commenter noted that the high rates for Federal flood insurance could make a difference in someone being able to buy their dream home. Another commenter stated that their “elderly clients are tired of having to sell their homes because their [Federal flood insurance policy] rates are so high.”

Several commenters supported the proposed rule because it could give homeowners and buyers financial breathing room and allow people to purchase homes without restrictions on purchasing power arising from the cost of flood insurance. One commenter noted the difficulty in advising clients that they are not eligible for a \$500 private flood policy and are required to purchase a \$3000 policy due to FHA requirements. The commenter also stated that in some cases the costs of FEMA insurance cause people to not be able to purchase a new home at all.

Another commenter stated that consumers should be allowed to choose their flood insurance policy, and that the current rule restricts consumer choice, creates inequities between FHA and more conventional loan holders, and raises barriers for FHA-insured loan products, which sometimes precludes first-time home buyers from closing on a home. One commenter stated, from the seller’s point of view, that after potential buyers with an FHA-insured loan realize that they will be adding “over \$100 to their house payment for flood insurance,” buyers choose not to go forward with the sale.

One commenter emphasized that the rule’s proposal to permit private flood insurance is significant and critical to consumer choice because “about 20

percent of home purchase first liens and about 15 percent of refinance transactions on 1–4 family dwelling are FHA-insured.” The commenter stated that every year there are thousands of borrowers who are not able to choose private flood insurance that is more affordable.

One commenter supported the proposed rule explaining that it would give homeowners the option to purchase private flood insurance during periods where NFIP may lapse. Additionally, one commenter noted that the rule would grow the private flood insurance market to complement the NFIP and expand consumer flood insurance options.

HUD Response: Changes to HUD’s flood insurance regulations to allow acceptance of private flood insurance policies offer access to a broader range of flood insurance options. Private flood insurance policies could provide potential cost savings to some borrowers compared to the cost of NFIP policies.⁶ Additionally, in the event of a lapse in appropriations for NFIP, a private insurance option could be available to borrowers.

Comments: HUD’s Proposed Rule Aligns With Industry Standards, Law, and Principles of Affordability, Consumer Choice, and Fiscal Responsibility

Some commenters stated that the proposed rule would more closely align HUD regulations with industry standards, statutory law, and principles of good governance, consumer choice, affordable housing, and fiscal prudence.

One commenter stated that the proposed rule will achieve HUD’s stated goal of more closely aligning FHA regulations “with industry standards and reduc[ing] the regulatory restrictions on flood insurance for FHA-insured loans.” The commenter also stated that the proposed rule would reduce regulatory restrictions on flood insurance for FHA-insured loans, provide greater consumer choice, and enhance homeownership opportunities for its members.

Another commenter stated that HUD’s rule aligns with the Biggert-Waters Act’s clear direction to all Federal agency regulated mortgagees to accept certain private flood insurance. The commenter stated that, “[d]rawing a distinction between agencies that ‘insure’ versus ‘lend’ is a hyper-technical legal reading of the statute that does not comply with the spirit—if not the exact letter—of the

law.” Similarly, the commenter stated that laws should be uniformly and consistently applied across the Federal Government, and that an “agency should not exploit a technical drafting error to avoid compliance with a statute, especially when Congressional intent is clear.” Finally, the commenter said HUD’s rule is fiscally prudent because providing for FHA mortgagee acceptance of private policies not only bolsters the FHA Fund but also protects taxpayers.

HUD Response: HUD’s intention is to align as much as possible with other Federal agencies, the intentions of the Biggert-Waters Act, and industry standards where appropriate, while issuing distinct regulations when necessary.

HUD is committed to removing barriers to affordable housing, supporting affordable housing opportunities, homeownership, and facilitating access to credit for borrowers. This rule could increase the entry-level housing supply in communities where flood insurance is required, while mitigating risk and protecting taxpayers’ funds. This rule is not expected to have a substantial direct budgetary impact to FHA’s Mutual Mortgage Insurance (MMI) Fund.

Mandatory Versus Permissive Requirement (Whether HUD’s Rule Should State That Mortgagees “May Accept” or “Must Accept” Private Flood Insurance Policies That Meet the Definition Under HUD’s Rule and the Biggert-Waters Flood Insurance Reform Act of 2012 (“Biggert-Waters Act”))

Comments: Support for a Permissive Requirement (Mortgagees “May Accept”)

Some commenters agreed with HUD’s decision to make optional mortgagees’ acceptance of private flood insurance policies that meet the definition of private flood insurance under HUD’s rule and the Biggert-Waters Flood Insurance Reform Act of 2012 (“Biggert-Waters Act”) (a mortgagee “may accept” a private flood insurance policy).

One commenter stated that “it is more appropriate to give [mortgagees] discretion to accept private flood policies by saying that they ‘may’ accept a private flood policy if it meets all of the definitions. While we respect that the borrower has the freedom of choice to find a private policy (provided the policy fits all of the required definitions/parameters), it is also important that the mortgagee has a choice based on past experiences with providers and their own risk tolerance levels.”

⁶ Please see the Regulatory Impact Analysis for the November 23, 2020, proposed rule for more information, at <https://www.regulations.gov/document/HUD-2020-0078-0040>.

Another commenter noted that mortgagees have greater expertise and a shared interest with borrowers in ensuring that the property is adequately covered by flood insurance. The commenter stated that directing mandatory acceptance could be warranted only in the presence of overwhelming policy reasons to do so, which are not present here. Another commenter explained that adding a mandatory acceptance requirement in HUD's regulations ("must accept") could create additional burdens for those mortgagees and servicers that are not subject to the Biggert-Waters Act requirement to accept private flood insurance since they may have to develop new procedures and processes to review private flood insurance policies. The commenter also noted that requiring the acceptance of private flood insurance could mean that some mortgagees and servicers would continue not to accept private flood insurance which could result in higher costs and limited choices for FHA borrowers.

Comments: Support for a Mandatory Requirement (Mortgagees "Must Accept")

Some commenters supported a mandatory requirement that mortgagees accept private flood insurance policies that meet the definition and requirements for a private flood insurance policy under HUD's rule and the Biggert-Waters Act. One commenter stated that having consistency between HUD's rule and that of the Federal financial regulators is beneficial to the consumer because it "provides consumer choice and prevents [mortgagees] from competing on underwriting guidelines."

One commenter explained that mandating the acceptance of private flood insurance would help further FEMA's "Moon Shot Initiative" to double the number of properties covered by flood insurance.

Another commenter stated that mandating private insurance would "harmonize FHA policies with Congressional intent to expand the private flood insurance market."

Another commenter stated that changing the practice of denying property owners access to private flood insurance is long overdue and that a mortgagee should be required to accept qualifying private flood insurance in lieu of an NFIP policy.

HUD Response: HUD recognizes the value of consistency across the housing finance industry with respect to flood insurance and the importance of providing borrowers the option to select

flood insurance coverage that best matches their needs.

HUD recognizes the importance of allowing mortgagees discretion to accept private flood insurance policies that meet HUD's requirements. This approach is similar to HUD's policy for accepting hazard insurance, where mortgagees have discretion to accept a policy. HUD requires the mortgagee to provide evidence of acceptable insurance coverage, where required, and does not prescribe which provider the mortgagee accepts. Under HUD's regulations for FHA-insured mortgages, HUD will not pay a claim to mortgagees for surchargeable damages that should have been covered by the required flood or hazard insurance; therefore, it is in the mortgagee's financial interest to ensure that the borrower has adequate coverage from a responsible insurance provider.

HUD does not anticipate this rule playing a role in furthering FEMA's "Moonshot Initiative" to increase the number of properties with flood insurance. Although FEMA has indicated its desire for more properties to carry flood insurance to help protect them against potential flood losses, FEMA's initiative seems targeted at homeowners who are not currently required to carry flood insurance, such as those who have paid off their mortgage. With this rule, HUD is not expanding the requirement for which FHA-insured mortgages are required to carry flood insurance.

Consideration of Whether HUD's Rule Should Offer a Discretionary Option for Mortgagees To Accept Policies That Do Not Meet the Definition of Private Flood Insurance Under HUD's Rule and the Biggert-Waters Act

Comments: Opposition to a Discretionary Option

One commenter applauded HUD for rejecting the "discretionary acceptance" option that was in the final joint rule published by the banking regulators. The Federal regulators' rule has a provision that provides that mortgagees may accept flood insurance that does not meet the definition of flood insurance in the banking regulator's joint final rule. The commenter stated the discretionary acceptance option "runs counter to Congressional intent of NFIP reforms" and that "[i]t is quite clear by the definition of private flood insurance in Section 100239 of the Biggert-Waters Flood Insurance Reform Act of 2012, that Congress wanted clear sideboards on what qualified as a private flood insurance policy for the purposes of meeting the mandatory

purchase requirement under the NFIP." The commenter found the Federal regulators' rule to circumvent "Congressional sideboards by enacting failed legislative proposals from 2016 through rulemaking." The commenter continued that a discretionary acceptance option "could lead to excessive deductibles" which would lower premiums but increase out-of-pocket "costs for the mortgagor to then ultimately recover when an event occurs." The commenter concluded that discretionary acceptance does not provide consumer protections and would result in taxpayers being forced to cover additional disaster losses.

Comments: Support for a Discretionary Option

Some commenters recommended that HUD provide a discretionary acceptance option. Commenters stated that if HUD does not provide FHA mortgagees with a discretionary acceptance provision, FHA borrowers effectively would be barred from the use of private insurance policies that may be available to non-FHA borrowers. This would undermine HUD's objectives of helping borrowers and providing more consumer choice in options for flood insurance products.

One commenter stated that following the Federal regulators' current framework, which includes a discretionary acceptance provision, will best protect the interest of insured borrowers and mortgagees by giving borrowers options to less expensive flood policies with the same or better coverage, and by giving mortgagees the flexibility to make their own determination of the adequacy of such policies.

Another commenter stated that without a discretionary acceptance provision, HUD's proposed rule may not actually afford consumers the options it seeks to provide because the proposal would only provide credit unions with the ability to accept private flood insurance in lieu of a Federal flood insurance policy if all the factors defining "private flood insurance" are present. The commenter stated that providing a discretionary acceptance provision would ease operations, minimize delays in the homebuying process, and enhance consumer choice. For example, without such a provision, credit unions may send private flood insurance policies to a specialist for review, if there is no expert on staff, to ensure the credit union may accept the policy. This may, in turn, lead to longer closing times and borrower frustration with the homebuying process.

One commenter pointed out that HUD's rule does not appear to allow

mortgagees to accept all residential policies offered by surplus line insurers, namely nonresidential commercial policies. The commenter explained that restricting acceptance to only commercial surplus lines coverage could hinder access to additional choices for residential flood insurance products. Surplus lines carriers may also be able to offer residential consumers additional coverage features or greater limits than the NFIP at a more affordable price.

Another commenter suggested that HUD “should allow discretionary acceptance of a private flood insurance policy regardless of HUD’s decision on whether accepting private flood insurance is a mandatory requirement or optional under its final regulations.” The commenter explained that this would promote harmony with the Flood Disaster Protection Act and consumer choice for FHA borrowers. Most mortgagees already “must” accept private flood insurance that meets the Biggert-Waters Act definition, under the Federal regulators’ rule. So, if HUD’s definition is “the same or substantially similar to the FDPA definition,” from which the Federal regulators’ definition derives, then “[HUD’s separate rule and definition] would appear to marginally help create the consistency and harmony with the FDPA that HUD is attempting to do.” However, if HUD uses a permissive (e.g., “may accept”), then some mortgagees will continue to not accept private flood insurance, even if the policy meets the definition. “This could result in higher costs and limited choices for FHA borrowers.” Therefore, HUD should offer a discretionary option in either case to permit mortgagees to accept policies that do not strictly conform to the statutory, and derivative, definitions.

The commenter explained that a discretionary option is especially crucial if HUD makes it mandatory that mortgagees accept policies that meet the definitions. A discretionary option would address elements important to institutional risk and consumer protections. The commenter stated that the statutory definition of “private flood insurance” is imprecise or impractical when considering actual insurance contracts, existing state law, and state approval processes; and, therefore, the final rule “can provide further detail” by establishing discretionary acceptance criteria.

HUD Response: HUD has determined that discretionary acceptance of policies that do not meet HUD’s requirements would not protect borrowers or FHA’s MMI Fund. HUD appreciates the feedback but believes that permitting

mortgagees the discretion to accept flood insurance policies that do not meet HUD’s private flood insurance requirements would not sufficiently mitigate risk and protect taxpayers’ funds.

HUD is concerned about the lack of deductible limits for discretionary acceptance of flood insurance policies in the Federal regulators’ rule, which could open borrowers to significant costs. There is no requirement that a deductible under these policies be no greater than that of a comparable NFIP policy; therefore, a policy that seems less expensive may have significantly higher deductibles leading to potentially prohibitively costly out-of-pocket expenses for the borrower when an event occurs. HUD is concerned that having uncapped deductible limits could have a negative impact on the financial stability of FHA-insured borrowers, which could lead to higher risk of default and foreclosure.

Furthermore, HUD does not believe that eliminating the option for discretionary acceptance will significantly reduce choice for most FHA-insured borrowers.

HUD appreciates the commenters’ desire for uniformity and HUD has strived to align with other agencies’ requirements where appropriate. While HUD aims to align with the Biggert-Waters Act, allowing mortgagees to permit a discretionary acceptance option does not align with the best interests of HUD’s borrowers or the MMI Fund.

Comments Suggested Criteria for a Discretionary Option

Some commenters that recommended HUD add a discretionary acceptance option also contended that HUD should include provisions outlining discretionary acceptance criteria identical or similar to the Federal agencies’ final regulation. One commenter offered suggested revisions to the regulatory text.

One commenter stated that HUD should allow mortgagees, specifically credit unions, “to accept private flood insurance policies in lieu of NFIP policies on FHA-insured mortgages, if the compliance aid is present, if the policy meets the mandatory acceptance criteria under the definition of ‘private flood insurance’ or if the policy meets the discretionary acceptance criteria outlined in the [Federal regulators’] Interagency Rule.”

Commenters recommended that the regulations permit FHA mortgagees to accept private flood insurance policies that meet discretionary acceptance criteria, even where those policies may not necessarily satisfy the technical

definition of “private flood insurance” in the Biggert-Waters Act. One commenter pointed to the Federal regulators’ regulations, which “require at least four criteria that must be satisfied before a mortgagee can exercise its discretion to accept [a] private flood insurance policy.”⁷ The commenter reasoned that the Biggert-Waters Act was meant to create a floor for policies that must be accepted or could not be rejected, and that it remains the province of the states to determine what constitutes acceptable insurance. This commenter also stated that a discretionary provision can be drafted in a manner that provides consumer choice while maintaining the safety and integrity of the Mutual Mortgage Insurance Fund, similar to the way that the Federal regulators’ rule protects the associated Federal insurance programs.

Commenters provided an example of how these principles should inform HUD’s addition of a discretionary acceptance option: Under the discretionary acceptance provision of the Federal regulators’ final rules and, where permitted by state insurance law, a mortgagee has the discretion to accept a private flood insurance policy that contains a 30-day notice provision rather than a 45-day notice provision as required under the Biggert-Waters Act. Commenters recommended HUD use this example to help guide its creation of discretionary option criteria.

One commenter emphasized that it is important for mortgagees to understand whether a private policy requires a separate or included disclosure with a statement of the availability of Federal flood insurance policies. The commenter said that “[Flood Disaster Protection Act] criteria require that a private policy must include a statement of the availability of flood insurance under the NFIP. In current practice this statement (when provided) is being provided by private carriers as a separate disclosure rather than embedded language in the actual policy contract. Discretionary acceptance criteria from FHA could exclude this as a required element or could clarify that this separate disclosure is satisfactory and meets the intent of the FDPA.”

HUD Response: HUD appreciates the specific feedback provided. However, HUD believes it is in the best interest of borrowers and HUD’s fiduciary responsibility to the Mutual Mortgage Insurance Fund to not offer a discretionary option and to require all private flood insurance policies to meet

⁷ See the four criteria explained at 84 FR 4953, 4962.

the definition of private flood insurance under this rule.

Consideration of Whether HUD Should Align Its Compliance Aid With the Federal Regulators' Compliance Aid

Comments: Support for HUD's Proposed Compliance Aid

Some commenters supported HUD's compliance aid or the inclusion of a compliance aid generally. Commenters supported HUD's compliance aid because it would assist mortgagees with the review of private flood insurance policies to ensure they are compliant with FHA's regulations, assist mortgagees in determining whether a policy meets the definition of "private flood insurance" without further review of the policy, and prove particularly helpful to smaller mortgagees that may lack resources or technical expertise to adequately review flood insurance policies.

Comments: Support for Making HUD's Compliance Aid Similar or Identical to the Federal Regulators'

Some commenters generally supported the addition of a compliance aid, but strongly recommended that HUD's compliance aid statement be identical or made more similar to Federal regulators' compliance aid language. Commenters wrote that this would ensure "the policy meets the definition of 'private flood insurance' and fulfills the requirements of both the Federal regulators and HUD." Further, this would enable FHA borrowers to immediately benefit from work done by the industry on the Federal regulators' compliance aid since February 2019. The commenter explained, "At this point, the specific language of the Federal regulators' compliance aid has already been incorporated into the state insurance legislative and regulatory infrastructure." The commenter provided an example from a state that enacted a new private flood insurance act in September 2020 that requires that a private flood policy must state that it meets the private flood insurance requirements specified in 42 U.S.C. 4012a(b) and may not contain provisions that, when taken as a whole, are not in compliance with that statutory provision. The commenter also explained that the Federal regulators' compliance aid language has been incorporated into legislation being developed by the National Council of Insurance Legislators (NCOIL), titled the Private Primary Residential Flood Insurance Model Act.⁸

⁸ NCOIL Adopts Private Primary Residential Flood Insurance Model Act, Nat'l Council of

Commenters stated that making HUD's compliance aid more similar or identical to the Federal regulators' will relieve compliance burden on FHA/ HUD mortgagees and provide "certainty" and prevent confusion for both mortgagees and consumers that private flood insurance policies meet requirements and will or should be accepted "without further analysis."

One commenter suggested that HUD clarify "at least as broad as" when it comes to deductibles and coverages, "specifically cautioning against excessive deductibles and ensuring the policy has an equivalent to Increased Cost of Coverage (ICC) that is found in an NFIP policy." The commenter explained their concern that the private sector's equivalent to ICC is "often optional rather than mandatory as with NFIP policies."

Some commenters pointed out that some insurers may choose not to include both HUD's and the Federal regulators' compliance aid statements, which would "narrow the pool of available private flood insurance coverage the [proposed rule] is intended to provide to FHA borrowers." Even if insurers did include both compliance aid statements, commenters explained that the experience of implementing the Federal regulators' compliance aid demonstrates that including two sets of compliance aid language would not be a simple process. Using different language for an FHA compliance aid would require insurers and mortgagees to use different sets of insurance policies and other documentation for FHA-insured loans. Another commenter suggested that an "FHA specific compliance aid is superfluous and will add an unnecessary cost to an already costly transaction." Similarly, another commenter explained that changes and procedures were put in place following the Federal regulators' 2019 rule and a second process for HUD's compliance aid would impose further burden.

One commenter recommended that if HUD does not adopt the Federal regulators' compliance aid, then HUD should clarify language in its compliance aid regarding the scope of coverage. This language should highlight limited utility in that the compliance aid only ensures compliance with HUD's regulations and not with the interagency rule. Placing this additional language into the compliance aid will provide clarity and put mortgagees on notice that, notwithstanding inclusion of HUD's

Insurance Legislators, Sept. 24, 2020, <https://ncoil.org/2020/09/24/ncoil-adopts-private-primary-residential-flood-insurance-model-act/>.

compliance aid, if a separate compliance aid that conforms to the Federal regulators' rule is not present, they will have to review the private flood insurance policy to determine its compliance with the Federal regulators' rule.

HUD Response: HUD appreciates the feedback regarding the compliance aid. The intention of the compliance aid is to assist mortgagees in understanding when an insurance policy coverage meets the definition of private flood insurance. The compliance aid is a voluntary option that private flood insurance companies may choose to provide.

HUD believes providing a compliance aid is important to assist mortgagees to understand when a private flood insurance policy meets HUD's requirements. This will facilitate the closing process by allowing the mortgagee to rely on the compliance aid instead of the mortgagee taking the time and developing the technical expertise to review the details of each private insurance policy. This aid also ensures that lack of technical expertise regarding flood insurance does not become an obstacle to the implementation of this policy.

HUD recognizes the value of consistency across the housing finance industry with respect to flood insurance. However, HUD's legal authority and requirements are distinct from that of the Federal regulators. The Biggert Waters Act does not require HUD to provide a private flood insurance option; therefore, HUD cannot rely on the authority of the Biggert-Waters Act referenced in the Federal regulators' compliance aid and must rely on its own authority. Furthermore, this rule is distinct from the Federal regulators' rule regarding the "may accept" versus "must accept" requirement, the discretionary acceptance option, and mutual aid associations. Therefore, a different compliance aid is necessary to highlight this distinction; HUD's compliance aid will specify compliance with HUD's requirements.

HUD believes it is in the best interest of borrowers and HUD's fiduciary responsibility to protect taxpayers' funds to have a distinct compliance aid to help ensure the requirements in this rule are met.

Additional Concerns Related to Aligning HUD's Proposed Rule With the Federal Regulators' Rule

While generally in support of the proposed rule, some commenters offered recommendations to improve the proposed rule. These commenters

agreed that the proposed rule would substantially benefit FHA borrowers, but suggested HUD more closely align its regulations with the Federal regulators' rule.

Comments: Support for Permitting Mortgagees To Accept Coverage Provided by Mutual Aid Societies

Some commenters recommended HUD, like the Federal regulators, permit mortgagees to accept coverage provided by mutual aid societies consistent with the Biggert-Waters Act. Commenters wrote that if such provisions are excluded, "individuals and families, whose religious beliefs, or other strictures conflict with the purchase of traditional NFIP or private flood insurance policies" would be excluded from being able to take advantage of private flood insurance which was intended to benefit all Americans. One commenter recommended using a provision comparable to the Federal regulators' mutual aid society provision. This commenter cited 12 CFR 22.3(3), which was amended by the Federal regulators' joint interim rule and suggested HUD adopt similar language. The changes would conform HUD's proposed rule to the Federal regulators' joint rule and permit acceptance of coverage by mutual aid societies.

HUD Response: HUD appreciates the comments and recognizes the value of consistency across the housing finance industry and has strived to balance those interests as appropriate. Unlike the requirements for NFIP and other private flood insurance providers, mutual aid associations are not required to be licensed, admitted, or otherwise approved to engage in the business of insurance by the insurance regulator of the State or jurisdiction in which the property to be insured is located. FHA does not have the expertise or authority to evaluate the ability of mutual aid associations to fulfill their obligations with regards to their insurance policies or their demonstrated history of fulfilling the terms of agreements to cover losses to members' property caused by flooding. Without specific guidance from FHA, mortgagees would be forced to evaluate the financial soundness of mutual aid associations which might be interpreted differently, causing confusion as well as an undue burden to mortgagees.

Given that mutual aid associations, as defined in the Federal regulators' rule, are not regulated by a State Insurance Regulator and that HUD's role is not to regulate financial institutions, HUD has determined that accepting flood insurance policies provided by mutual

aid associations could create a financial risk to borrowers and the MMI Fund.

Comments: Aligning HUD's Rule With the Federal Regulators' Rule Will Create Better Consistency in the Industry and Promote Correct Application of Regulations

One commenter noted that aligning HUD's rule with the Federal regulators' rule would allow borrowers and mortgagees to draw on the policies, documentation, and practices that mortgagees, flood insurance companies, and others have already adopted under the Federal regulators' requirements—which would reduce the risk of mortgagees misapplying FHA regulations. Other commenters recommended consistency throughout the lending process and within industry standards to maintain discretionary acceptance criteria.

Some commenters supported HUD's proposed definition of private flood insurance. However, one commenter recommended HUD better align its definition with the Federal regulators' definition in their joint final rule. The commenter reasoned that while some differences between the specific language in the two regulations are necessary and appropriate (e.g., using "FHA" rather than "regulated lending institution"), other differences create risk that a reader could make an incorrect inference that differences are intended to have substantive impact, which appears not to be the case.

Another commenter explained that "[a]dopting identical language in [HUD's] regulation would be consistent with HUD's proposed approach to the acceptance of private flood insurance." Then the commenter referred to the definition of "private flood insurance" in the proposed FHA regulation and the Federal regulators' final regulations and explained that both explicitly incorporate the definition at 42 U.S.C. 4012a(b)(7). The commenter stated that HUD's proposed definition of "private flood insurance" is not materially different from the definitions of "private flood insurance" in the Federal agencies' final regulations, and HUD's proposed regulation could fairly be characterized as a "corresponding regulation."

One commenter stated it is critical that HUD implement regulations consistent with the Federal flood insurance regulations regarding the definition of "private flood insurance," language used in the compliance aid statement, and a mortgagee's discretionary acceptance of a private flood insurance policy that is sufficient protection for the loan.

HUD Response: HUD appreciates the comments and recognizes the value of consistency across the housing finance industry and has strived to align with the other agency's requirements where possible and appropriate. The discretionary acceptance provision under the Federal regulators' rule creates financial risk for FHA borrowers and the MMI Fund.

Other Issues Raised by Commenters

Comments: Concerns About Continuous Coverage

One commenter expressed a concern for the loss of continuous coverage since private flood insurance is not seen as continuous coverage by the NFIP, meaning borrowers will lose subsidies they have with NFIP if they decide to go back after switching to private flood insurance. For example, homeowners who seek FHA mortgages may already be financially constrained and should they need to return to NFIP for flood insurance it could result in them having higher premiums. Additionally, even if the homeowner is informed of this risk, it may not prevent someone who is focused on cost savings from deciding to switch, putting them in a detrimental position that is long-term and may affect the sale of their property.

The commenter pointed out legislation that has already been introduced and seeks to "amend the definition of continuous coverage to include the provision of private flood insurance."⁹ The commenter expects this legislation to pass into law soon and to become a part of the comprehensive reform of the NFIP. The commenter stated that for these reasons, the rule is premature and should be postponed until legislation is adopted that will protect homeowners who choose to switch back to NFIP. The new legislation will ensure homeowners can have previous subsidized rates after having continuous coverage either through NFIP or private flood insurance.

HUD Response: HUD appreciates the comment and the commentator's desire to protect homeowners from increased prices under private flood insurance policies. HUD notes and appreciates commenters' concerns about proposed legislation. HUD is publishing this rule to align with the intention of the Biggert-Waters Act. HUD only has authority to act on current law; legislation cited by commenters was not signed into law. Other agencies' forthcoming rules may consider not only borrowers but all homeowners with federally backed mortgages who

⁹ See H.R. 2874, 115th Cong. (2017); H.R. 1666, 116th Cong. (2019); S. 1313, 115th Cong. (2017).

have the option to purchase a private flood insurance policy in lieu of an NFIP policy, where one is required.

Comments: HUD's Regulatory Burden Analysis Is Flawed

One commenter stated that the regulatory burden analysis claims that most private flood insurance is sold on the surplus lines market as opposed to the admitted market and dominated by large international insurers. The commenter stated this is "a complete misunderstanding of the surplus lines market and refuted in a closer reading of the report cited as the source of the information."¹⁰

HUD Response: HUD appreciates the feedback and concern regarding data sourcing. As stated, there is limited data regarding flooding insurance companies. HUD utilized a peer reviewed study published in professional risk industry journals, which is considered a reliable source of data.

This data was taken from Kousky et al. (2018). The authors' paper is among the limited existing studies on residential private flood insurance. The authors stated that "more policies are written by surplus lines carriers than by admitted carriers. . . . This is unsurprising, since surplus lines firms tend to cover new or catastrophic risks for which consumers may have trouble finding coverage in the admitted market."¹¹ In addition, "the largest US homeowners insurance companies have generally been hesitant to enter the flood [insurance] market, although a few have begun to enter through subsidiaries."¹²

HUD expects that more private insurers—either admitted carriers or surplus lines carriers, and of any company size—will be offering flood insurance soon or have already started offering flood insurance, especially after

¹⁰ The commenter cited Carolyn Kousky, et al., *The Emerging Private Residential Flood Insurance Market in the United States, Risk Management and Decision Processes Center, Wharton, University of Pennsylvania* (2018). The commenter stated that the report explains that, "large surplus lines carriers 'E&S' companies work with wholesalers known as managing general agencies (MGAs) or managing general underwriters (MGUs). An MGA/MGU works on behalf of the insurer and organizes and manages its book of business. The MGA/MGU will employ the underwriters, develop premium-setting practices, issue policies on the insurer's behalf, and manage claims payments. They get a fee or share of premiums for these services. An MGU, as opposed to an MGA, also undertakes the underwriting. MGAs vary significantly in their size and scope. Some offer a wide range of E&S products; others focus on only a specific category of coverage or just one product. Some operate nationally; others work only in a given region or locality (Hull 2002)."

¹¹ *Id.* at 2.

¹² *Id.*

the Federal regulators passed their rule on the acceptance of private flood insurance. "As insurers' familiarity with flood catastrophe models grows, as underwriting experience develops, and as state regulatory structures evolve, the number of private flood policies in force could continue to grow, including among admitted carriers."¹³

Comments: HUD's Rule Would Address Issues Raised in a Recent HUD OIG Report

Some commenters stated that the proposed rule would help address an issue raised by HUD's Office of Inspector General (OIG) in a report issued January 5, 2021.¹⁴ The recent report found that at least 3,870 FHA-insured loans totaling \$940 million "had private flood insurance coverage instead of the required national flood insurance program coverage, coverage that did not meet the minimum required amount, or no coverage at the time the loan was closed and endorsed."¹⁵ Every other Federal lending authority now allows, and in many cases requires, the acceptance of private flood insurance, leaving FHA mortgagees with an untenable choice: follow their regulator's private flood insurance requirement and risk the FHA insurance down the road, or walk away from FHA loan products entirely. The commenters stated that this is an unacceptable situation.

HUD Response: HUD agrees that this rule should help reduce confusion for borrowers and mortgagees, who may not have realized that HUD did not previously accept private flood insurance policies in lieu of NFIP policies, although other Federal agencies did. This issue was identified in a recent HUD OIG audit.¹⁶ This rule should remove that source of confusion and non-compliance by allowing FHA borrowers to purchase a flood insurance policy that meets HUD's requirements.

IV. Findings and Certifications

Executive Order 12866 and Executive Order 13563

Under Executive Order 12866 (Regulatory Planning and Review), a

¹³ *Id.*

¹⁴ Office of Inspector Gen., U.S. Dep't of Hous. & Urban Dev., Audit Rep. No. 2021-KC-0002 (2021), <https://www.hudoig.gov/sites/default/files/2021-01/2021-KC-0002.pdf> ("Audit Rep. No. 2021-KC-0002").

¹⁵ *FHA Insured \$940 Million in Loans for Properties in Flood Zones Without the Required Flood Insurance*, *HudOig.Gov*. Jan. 5, 2021, <https://www.hudoig.gov/reports-publications/report/fha-insured-940-million-loans-properties-flood-zones-without-required>.

¹⁶ See Audit Rep. No. 2021-KC-0002, *supra* note 8.

determination must be made whether a regulatory action is significant and therefore, subject to review by the Office of Management and Budget (OMB) in accordance with the requirements of the order. Executive Order 13563 (Improving Regulations and Regulatory Review) directs executive agencies to analyze regulations that are "outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned." Executive Order 13563 also directs that, where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, agencies are to identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public.

This rule was determined to be a "significant regulatory action" under section 3(f) of Executive Order 12866 (but not an economically significant action under section 3(f)(1) of the Executive order).

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. As explained in HUD's November 23, 2020, proposed rule, supervised mortgagees are among FHA-approved lenders. These mortgagees are supervised by the Federal regulators. Based on the analysis developed by the Federal regulators and published as part of their final rule (see 84 FR 4953), the Federal regulators determined that allowing private flood insurance in mortgage transactions conducted by these mortgagees would not have a significant economic impact on a substantial number of small entities they supervised. This finding is also true for the share of regulated lending institutions supervised by the Federal regulators that are FHA-approved lenders.

Small entities also include small businesses, small not-for-profit organizations, and small governmental jurisdictions. This rule, however, offers a benefit to all FHA-approved mortgagees regardless of the size of the firm. Allowing private insurers to compete provides business opportunities to those private insurers. The rule provides a compliance aid which will allow all mortgagees, including small mortgagees that may

lack technical expertise regarding flood insurance policies, to conclude that a policy meets the definition of “private flood insurance” without further review of the policy if the policy, or an endorsement to the policy, states: “This policy meets the definition of private flood insurance contained in 24 CFR 203.16a(e) for FHA-insured mortgages.” This proposed rule would also reduce the burden to all mortgagees, including those small entities, by aligning FHA’s regulations with those issued by the Federal regulators.

For flood insurance companies, there is less data. However, existing analysis by Kousky et al. (2018)¹⁷ on private insurers that are currently providing flood insurance shows that these private insurance companies are mostly surplus line carriers that operate globally. This finding implies that such carriers cannot be considered as small entities. Taking advantage of the business opportunities is more difficult for small firms because large firms are inherently favored by their ability to spread flood risk. However, as the private flood insurance market expands, it is expected to become less concentrated, to the benefit of small entities. Overall, HUD believes that this rule will not have a significant impact on a substantial number of small entities, and the impact of the rule on those small entities impacted will be beneficial rather than adverse. Therefore, HUD certifies that this rule is not expected to have a significant economic impact on small entities.

Environmental Impact

A Finding of No Significant Impact (FONSI) with respect to the environment was made at the proposed rule stage in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). The FONSI remains applicable and is available for public inspection on www.regulations.gov.

Executive Order 13132, Federalism

Executive Order 13132 (entitled “Federalism”) prohibits an agency from publishing any rule that has federalism implications if the rule either (i) imposes substantial direct compliance costs on state and local governments and is not required by statute, or (ii) preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the

Executive order. This rule does not have federalism implications and would not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive order.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) (UMRA) establishes requirements for Federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments, and on the private sector. This rule does not impose any Federal mandates on any state, local, or tribal governments, or on the private sector, within the meaning of the UMRA.

List of Subjects

24 CFR Part 201

Claims, Health facilities, Historic preservation, Home improvement, Loan programs-housing and community development, Manufactured homes, Mortgage insurance, Reporting and recordkeeping requirements.

24 CFR Part 203

Hawaiian Natives, Home improvement, Indians-lands, Loan programs-housing and community development, Mortgage insurance, Reporting and recordkeeping requirements, Solar energy.

24 CFR Part 206

Aged, Condominiums, Loan programs-housing and community development, Mortgage insurance, Reporting and recordkeeping requirements.

For the reasons discussed in the preamble, HUD amends 24 CFR parts 201, 203, and 206 as follows:

PART 201—TITLE I PROPERTY IMPROVEMENT AND MANUFACTURED HOME LOANS

- 1. The authority citation for part 201 continues to read as follows:

Authority: 12 U.S.C. 1703; 15 U.S.C. 1639c; 42 U.S.C. 3535(d).

- 2. In § 201.28, revise paragraph (a) to read as follows:

§ 201.28 Flood and hazard insurance, and Coastal Barriers properties.

(a) *Flood insurance.* No property improvement loan or manufactured home loan shall be eligible for insurance under this part if the property securing repayment of the loan is located in a special flood hazard area identified by the Federal Emergency Management Agency (FEMA), unless the community

in which the area is situated is participating in the National Flood Insurance Program, flood insurance under the National Flood Insurance Program (NFIP) is available with respect to such property improvements, and flood insurance on the property is obtained by the borrower in compliance with section 102 of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a). Such insurance shall be in the form of the standard policy issued under the National Flood Insurance Program (NFIP) or private flood insurance, as defined in 24 CFR 203.16a. Such insurance shall be obtained at any time during the term of the loan that the lender determines that the secured property is located in a special flood hazard area identified by FEMA and shall be maintained by the borrower for the remaining term of the loan, or until the lender determines that the property is no longer in a special flood hazard area, or until the property is repossessed or foreclosed upon by the lender. The amount of such insurance shall be at least equal to the unpaid balance of the Title I loan, and the lender shall be named as the loss payee for flood insurance benefits. A lender may determine that a private flood insurance policy meets the definition of private flood insurance, as defined in 24 CFR 203.16a, without further review of the policy, if the compliance aid statement provided in 24 CFR 203.16a(c) is included within the policy or as an endorsement to the policy.

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PART 203—SINGLE FAMILY MORTGAGE INSURANCE

- 3. The authority citation for part 203 continues to read as follows:

Authority: 12 U.S.C. 1707, 1709, 1710, 1715b, 1715z–16, 1715u, and 1715z–21; 15 U.S.C. 1639c; 42 U.S.C. 3535(d).

- 4. Revise § 203.16a to read as follows:

§ 203.16a Mortgagor and mortgagee requirement for maintaining flood insurance coverage.

(a) *In general.* (1) The requirements of this section apply if a mortgage is to cover property improvements that:

(i) Are located in an area designated by the Federal Emergency Management Agency (FEMA) as a floodplain area having special flood hazards;

(ii) Are otherwise determined by the Commissioner to be subject to flood hazard; or

(iii) Are not otherwise covered by the flood insurance standard for condominium projects established under § 203.43b(d)(6)(iii) or (i)(1).

¹⁷ Kousky, C., H. Kunreuther, B. Lingle, and L. Shabman (2018). *The Emerging Private Residential Flood Insurance Market in the United States, Risk Management and Decision Processes Center, Wharton, University of Pennsylvania*, July.

(2) No mortgage may be insured that covers property improvements located in an area that has been identified by FEMA as an area having special flood hazards unless the community in which the area is situated is participating in the National Flood Insurance Program and flood insurance under the National Flood Insurance Program (NFIP) is available with respect to such property improvements. Such requirement for flood insurance shall be effective one year after the date of notification by FEMA to the chief executive officer of a flood prone community that such community has been identified as having special flood hazards.

(3) For purposes of this section, property improvement means a dwelling and related structures/ equipment essential to the value of the property and subject to flood damage.

(b) *Flood insurance obligation.* The mortgagor and mortgagee shall be obligated, by a special condition to be included in the mortgage commitment, to obtain and maintain either NFIP flood insurance or private flood insurance coverage on the property improvements.

(c) *Insurance policy.* A mortgagee may accept a flood insurance policy in the form of the standard policy issued under the NFIP or a private flood insurance policy as defined in this section, and the mortgagee shall be named as the loss payee for flood insurance benefits. A mortgagee may determine that a private flood insurance policy meets the definition of private flood insurance in this section, without further review of the policy, if the following statement is included within the policy or as an endorsement to the policy: "This policy meets the definition of private flood insurance contained in 24 CFR 203.16a(e) for FHA-insured mortgages."

(d) *Duration and amount of coverage.* The flood insurance must be maintained during such time as the mortgage is insured in an amount at least equal to the lowest of the following:

(1) 100 percent replacement cost of the insurable value of the improvements, which consists of the development or project cost less estimated land cost; or

(2) The maximum amount of NFIP insurance available with respect to the particular type of property; or

(3) The outstanding principal balance of the loan.

(e) *Private flood insurance defined.* The term "private flood insurance" means an insurance policy that:

(1) Is issued by an insurance company that is:

(i) Licensed, admitted, or otherwise approved to engage in the business of

insurance in the State or jurisdiction in which the insured building is located, by the insurance regulator of that State or jurisdiction; or

(ii) In the case of a policy of difference in conditions, multiple peril, all risk, or other blanket coverage insuring nonresidential commercial property, is recognized, or not disapproved, as a surplus lines insurer by the insurance regulator of the State or jurisdiction where the property to be insured is located;

(2) Provides flood insurance coverage that is at least as broad as the coverage provided under a standard flood insurance policy under the National Flood Insurance Program for the same type of property, including when considering deductibles, exclusions, and conditions offered by the insurer. To be at least as broad as the coverage provided under a standard flood insurance policy under the National Flood Insurance Program, the policy must, at a minimum:

(i) Define the term "flood" to include the events defined as a "flood" in a standard flood insurance policy under the National Flood Insurance Program;

(ii) Contain the coverage specified in a standard flood insurance policy under the National Flood Insurance Program, including that relating to building property coverage; personal property coverage, if purchased by the insured mortgagor(s); other coverages; and increased cost of compliance coverage;

(iii) Contain deductibles no higher than the specified maximum, and include similar non-applicability provisions, as under a standard flood insurance policy under the National Flood Insurance Program, for any total policy coverage amount up to the maximum available under the NFIP at the time the policy is provided to the lender;

(iv) Provide coverage for direct physical loss caused by a flood and may only exclude other causes of loss that are excluded in a standard flood insurance policy under the National Flood Insurance Program. Any exclusions other than those in a standard flood insurance policy under the National Flood Insurance Program may pertain only to coverage that is in addition to the amount and type of coverage that could be provided by a standard flood insurance policy under the National Flood Insurance Program or have the effect of providing broader coverage to the policyholder; and

(v) Not contain conditions that narrow the coverage provided in a standard flood insurance policy under the National Flood Insurance Program;

(3) Includes all of the following:

(i) A requirement for the insurer to give 45 days' written notice of cancellation or non-renewal of flood insurance coverage to:

(A) The insured;

(B) The mortgagee, if any; and

(C) Federal Housing Administration (FHA), in cases where the mortgagee has assigned the loan to FHA in exchange for claim payment;

(ii) Information about the availability of flood insurance coverage under the National Flood Insurance Program;

(iii) A mortgage interest clause similar to the clause contained in a standard flood insurance policy under the National Flood Insurance Program; and

(iv) A provision requiring an insured to file suit not later than 1 year after the date of a written denial of all or part of a claim under the policy; and

(4) Contains cancellation provisions that are as restrictive as the provisions contained in a standard flood insurance policy under the National Flood Insurance Program.

■ 5. In § 203.343, revise paragraph (b)(3) to read as follows:

§ 203.343 Partial release, addition or substitution of security.

* * * * *

(b) * * *

(3) The property to which the dwelling is removed is in an area known to be reasonably free from natural hazards or, if in a flood zone, the mortgagor will insure or reinsure under the National Flood Insurance Program or obtain equivalent private flood insurance coverage as defined in § 203.16a.

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PART 206—HOME EQUITY CONVERSION MORTGAGE INSURANCE

■ 6. The authority citation for part 206 continues to read as follows:

Authority: 12 U.S.C. 1715b, 1715z–20; 42 U.S.C. 3535(d).

■ 7. In § 206.45, revise paragraph (c) to read as follows:

§ 206.45 Eligible properties.

* * * * *

(c) *Borrower and mortgagee requirement for maintaining flood insurance coverage—(1) In general.* (i) The requirements of this paragraph (c) apply if a mortgage is to cover property improvements that:

(A) Are located in an area designated by the Federal Emergency Management Agency (FEMA) as a floodplain area having special flood hazards;

(B) Are otherwise determined by the Commissioner to be subject to a flood hazard; or

(C) Are not otherwise covered by the flood insurance standard for condominium projects established under 24 CFR 203.43b(d)(6)(iii) or (i)(1).

(ii) No mortgage may be insured that covers property improvements located in an area that has been identified by FEMA as an area having special flood hazards, unless the community in which the area is situated is participating in the National Flood Insurance Program (NFIP) and flood insurance is obtained by the borrower. Such flood insurance shall be in the form of the standard policy issued under the NFIP or private flood insurance as defined in paragraph (c)(6) of this section. Such requirement for flood insurance shall be effective one year after the date of notification by FEMA to the chief executive officer of a flood prone community that such community has been identified as having special flood hazards.

(iii) For purposes of this section, property improvement means a dwelling and related structures/ equipment essential to the value of the property and subject to flood damage.

(2) *Flood insurance obligation.* During such time as the mortgage is insured, the borrower and mortgagee shall be obligated, by a special condition to be included in the mortgage commitment, to obtain and to maintain flood insurance coverage under either the NFIP or equivalent private flood insurance coverage as defined in paragraph (c)(6) of this section on the property improvements. The mortgagee shall be named as the loss payee for flood insurance benefits. A mortgagee may determine that a private flood insurance policy meets the definition of private flood insurance in this section, without further review of the policy, if the compliance aid statement provided in 24 CFR 203.16a(c) is included within the policy or as an endorsement to the policy.

(3) *Duration and amount of coverage.* The flood insurance must be maintained during such time as the mortgage is insured in an amount at least equal to the lowest of the following:

(i) 100 percent replacement cost of the insurable value of the improvements, which consists of the development or project cost less estimated land cost; or

(ii) The maximum amount of the NFIP insurance available with respect to the particular type of the property; or

(iii) The outstanding principal balance of the loan.

(4) *Private flood insurance defined.* The term “private flood insurance” means an insurance policy that:

(i) Is issued by an insurance company that is:

(A) Licensed, admitted, or otherwise approved to engage in the business of insurance in the State or jurisdiction in which the insured building is located, by the insurance regulator of that State or jurisdiction; or

(B) In the case of a policy of difference in conditions, multiple peril, all risk, or other blanket coverage insuring nonresidential commercial property, is recognized, or not disapproved, as a surplus lines insurer by the insurance regulator of the State or jurisdiction where the property to be insured is located;

(ii) Provides flood insurance coverage that is at least as broad as the coverage provided under a standard flood insurance policy under the National Flood Insurance Program for the same type of property, including when considering deductibles, exclusions, and conditions offered by the insurer. To be at least as broad as the coverage provided under a standard flood insurance policy under the National Flood Insurance Program, the policy must, at a minimum:

(A) Define the term “flood” to include the events defined as a “flood” in a standard flood insurance policy under the National Flood Insurance Program;

(B) Contain the coverage specified in a standard flood insurance policy under the National Flood Insurance Program, including that relating to building property coverage; personal property coverage, if purchased by the insured mortgagor(s); other coverages; and increased cost of compliance coverage;

(C) Contain deductibles no higher than the specified maximum, and include similar non-applicability provisions, as under a standard flood insurance policy under the National Flood Insurance Program, for any total policy coverage amount up to the maximum available under the NFIP at the time the policy is provided to the lender;

(D) Provide coverage for direct physical loss caused by a flood and may only exclude other causes of loss that are excluded in a standard flood insurance policy under the National Flood Insurance Program. Any exclusions other than those in a standard flood insurance policy under the National Flood Insurance Program may pertain only to coverage that is in addition to the amount and type of coverage that could be provided by a standard flood insurance policy under the National Flood Insurance Program

or have the effect of providing broader coverage to the policyholder; and

(E) Not contain conditions that narrow the coverage provided in a standard flood insurance policy under the National Flood Insurance Program;

(iii) Includes all of the following:

(A) A requirement for the insurer to give 45 days’ written notice of cancellation or non-renewal of flood insurance coverage to:

(1) The insured;

(2) The mortgagee, if any; and

(3) Federal Housing Administration (FHA), in cases where the mortgagee has assigned the loan to FHA in exchange for claim payment;

(B) Information about the availability of flood insurance coverage under the National Flood Insurance Program;

(C) A mortgage interest clause similar to the clause contained in a standard flood insurance policy under the National Flood Insurance Program; and

(D) A provision requiring an insured to file suit not later than 1 year after the date of a written denial of all or part of a claim under the policy; and

(iv) Contains cancellation provisions that are as restrictive as the provisions contained in a standard flood insurance policy under the National Flood Insurance Program.

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§ 206.134 [Amended]

■ 8. In § 206.134, amend paragraph (b)(3) by adding the phrase “or obtain equivalent private flood insurance coverage, as defined in § 203.16a of this chapter” after “National Flood Insurance Program”.

Julia R. Gordon,

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DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2022–0938]

Special Local Regulations; Marine Events Within the Captain of the Port Charleston

AGENCY: Coast Guard, DHS.

ACTION: Notification of enforcement of regulation.

SUMMARY: The Coast Guard will enforce the special local regulation to provide for the safety and security of certain