DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 22

[Docket ID OCC-2016-0005]

RIN 1557-AD67

FEDERAL RESERVE SYSTEM

12 CFR Part 208, Regulation H

Docket No.R-1549

RIN 7100 AE-60

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 339

RIN 3064-AE27

FARM CREDIT ADMINISTRATION

12 CFR Part 614

Docket No. 6705-01-P

RIN 3052-AD11

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 760

RIN 3133-AE64

Loans in Areas Having Special Flood Hazards – Private Flood Insurance

AGENCIES: Office of the Comptroller of the Currency; Board of Governors of the Federal Reserve System; Federal Deposit Insurance Corporation; Farm Credit Administration; National Credit Union Administration.

ACTION: Joint notice of proposed rulemaking.

SUMMARY: The Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System (Board), the Federal Deposit Insurance Corporation (FDIC), the Farm Credit Administration (FCA), and the National Credit Union Administration (NCUA) are issuing a new proposal to amend their regulations regarding loans in areas having special flood hazards to implement the private flood insurance provisions of the Biggert-Waters Flood Insurance Reform Act of 2012 (Biggert-Waters Act). Specifically, the proposed rule would require regulated lending institutions to accept policies that meet the statutory definition of private flood insurance in the Biggert-Waters Act and permit regulated lending institutions to accept flood insurance provided by private insurers that does not meet the statutory definition of "private flood insurance" on a discretionary basis, subject to certain restrictions.

DATES: Comments must be received on or before **[INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES:

OCC: Because paper mail in the Washington, DC area and at the OCC is subject to delay, commenters are encouraged to submit comments through the Federal eRulemaking Portal or e-mail, if possible. Please use the title "Loans in Areas Having Special Flood Hazards – Private Flood Insurance" to facilitate the organization and distribution of the comments. You may submit comments by any of the following methods:

- Federal eRulemaking Portal—"Regulations.gov": Go to *www.regulations.gov*. Enter "Docket ID OCC-2016-0005" in the Search Box and click "Search." Click on "Comment Now" to submit public comments.

- Click on the "Help" tab on the Regulations.gov home page to get information on using Regulations.gov, including instructions for submitting public comments.

- E-mail: *regs.comments@occ.treas.gov*.

- Mail: Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, 400 7th Street, SW., suite 3E-218, mail stop 9W-11, Washington, DC 20219.

- Hand Delivery/Courier: 400 7th Street, SW., suite 3E-218, mail stop 9W-11, Washington, DC 20219.

- Fax: (571) 465-4326.

Instructions: You must include "OCC" as the agency name and "Docket ID OCC-2016-0005" in your comment. In general, the OCC will enter all comments received into the docket and publish them on the Regulations.gov website without change, including any business or personal information that you provide such as name and address information, e-mail addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this rulemaking action by any of the following methods:

- Viewing Comments Electronically: Go to *www.regulations.gov*. Enter "Docket ID OCC-2016-0005" in the Search box and click "Search." Click on "Open Docket Folder" on the

right side of the screen and then "Comments." Comments can be filtered by clicking on "View All" and then using the filtering tools on the left side of the screen.

- Click on the "Help" tab on the Regulations.gov home page to get information on using Regulations.gov. Supporting materials may be viewed by clicking on "Open Docket Folder" and then clicking on "Supporting Documents." The docket may be viewed after the close of the comment period in the same manner as during the comment period.

- Viewing Comments Personally: You may personally inspect and photocopy comments at the OCC, 400 7th Street, SW., Washington, DC 20219. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 649-6700 or, for persons who are deaf or hard of hearing, TTY, (202) 649-5597. Upon arrival, visitors will be required to present valid government-issued photo identification and submit to security screening in order to inspect and photocopy comments.

Board: You may submit comments, identified by Docket No. R-1549 or RIN 7100 AE-60, by any of the following methods:

- Agency Website: http://www.federalreserve.gov. Follow the instructions for submitting comments at http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.
- Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.
- E-mail: regs.comments@federalreserve.gov. Include the docket number in the subject line of the message.
- Fax: (202) 452-3819 or (202) 452-3102.
- Mail: Address to Robert deV. Frierson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW., Washington, DC 20551.

All public comments will be made available on the Board's Website at http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm as submitted, unless modified for technical reasons. Accordingly, comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper in Room MP-500 of the Board's Martin Building (20th and C Streets, NW.) between 9:00 a.m. and 5:00 p.m. on weekdays.

FDIC: You may submit comments by any of the following methods:

- Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.
- Agency Website: http://www.fdic.gov/regulations/laws/federal/propose.html.
- Mail: Robert E. Feldman, Executive Secretary, Attention: Comments/Legal ESS, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429.
- Hand Delivered/Courier: The guard station at the rear of the 550 17th Street Building (located on F Street), on business days between 7:00 a.m. and 5:00 p.m.
- E-mail: comments@FDIC.gov.

Comments submitted must include "FDIC" and "Loans in Areas Having Special Flood Hazards – Private Flood Insurance." Comments received will be posted without change to http://www.fdic.gov/regulations/laws/federal/propose.html, including any personal information provided.

FCA: We offer a variety of methods for you to submit your comments. For accuracy and efficiency reasons, commenters are encouraged to submit comments by e-mail or through the FCA's Website. As facsimiles (fax) are difficult for us to process and achieve compliance with section 508 of the Rehabilitation Act, we are no longer accepting comments submitted by fax.

Regardless of the method you use, please do not submit your comments multiple times via different methods. You may submit comments by any of the following methods:

- E-mail: Send us an e-mail at reg-comm@fca.gov.
- Agency Website: http://www.fca.gov. Select "Law & Regulations," then "FCA Regulations," then "Public Comments," and follow the directions for "Submitting a Comment."
- Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.
- Mail: Barry F. Mardock, Deputy Director, Office of Regulatory Policy, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102-5090.

You may review copies of all comments we receive at our office in McLean, Virginia or on our Website at http://www.fca.gov. Once you are in the Website, select "Law & Regulations," then "FCA Regulations," then "Public Comments," and follow the directions for "Reading Submitted Public Comments." We will show your comments as submitted, including any supporting data provided, but for technical reasons we may omit items such as logos and special characters. Identifying information that you provide, such as phone numbers and addresses, will be publicly available. However, we will attempt to remove e-mail addresses to help reduce Internet spam.

NCUA: You may submit comments, identified by RIN 3133-AE64 by any of the following methods (Please send comments by one method only):

- Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.
- Agency Website: http://www.ncua.gov. Follow the instructions for submitting comments.

- E-mail: Address to regcomments@ncua.gov. Include [Your name] Comments on "Loans in Areas Having Special Flood Hazards – Private Flood Insurance" in the e-mail subject line.
- Fax: (703) 518-6319. Use the subject line described above for e-mail.
- Mail: Address to Gerard S. Poliquin, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314-3428.
- Hand Delivery/Courier: Same as mail address.
- All public comments are available on the agency's Website at http://www.ncua.gov/Legal/Regs/Pages/PropRegs.aspx as submitted, except when not possible for technical reasons. Public comments will not be edited to remove any identifying or contact information. Paper copies of comments may be inspected in NCUA's law library at 1775 Duke Street, Alexandria, VA 22314, by appointment weekdays between 9:00 a.m. and 3:00 p.m. To make an appointment, call (703) 518-6546 or send an e-mail to OGCMail@ncua.gov.

FOR FURTHER INFORMATION CONTACT:

OCC: Rhonda L. Daniels, Compliance Specialist, Compliance Policy Division, (202) 649-5405; Margaret C. Hesse, Senior Counsel, Community and Consumer Law Division, (202) 649-6350; or Heidi M. Thomas, Special Counsel, or Melissa Lisenbee, Attorney, Legislative and Regulatory Activities Division, (202) 649-5490, or, for persons who are deaf or hard of hearing, TTY, (202) 649-5597.

Board: Lanette Meister, Senior Supervisory Consumer Financial Services Analyst (202) 452-2705; Vivian W. Wong, Senior Counsel (202) 452-3667, Division of Consumer and Community

Affairs; or Daniel Ericson, Counsel (202) 452-3359, Legal Division; for users of Telecommunications Device for the Deaf (TDD) only, contact (202) 263-4869.

FDIC: Navid Choudhury, Counsel, Consumer Compliance Unit, Legal Division, (202) 898-6526; or John Jackwood, Senior Policy Analyst, Division of Depositor and Consumer Protection, (202) 898-3991.

FCA: Paul K. Gibbs, Associate Director, Office of Regulatory Policy (703) 883-4203, TTY (703) 883-4056; or Mary Alice Donner, Senior Counsel, Office of General Counsel (703) 883-4020, TTY (703) 883-4056.

NCUA: Sarah Chung, Staff Attorney, Office of General Counsel, (703) 518–6540, or Judy Graham, Program Officer, Office of Examination and Insurance, (703) 518-6392.

SUPPLEMENTARY INFORMATION:

I. Background

A. Flood Insurance Statutes

The National Flood Insurance Act of 1968 (1968 Act)[1] and the Flood Disaster Protection Act of 1973 (FDPA)[2], as amended, (collectively referenced herein as the Federal flood insurance statutes) govern the National Flood Insurance Program (NFIP).[3] These laws make Federally subsidized flood insurance available to owners of improved real estate or mobile homes located in participating communities and require the purchase of flood insurance in connection with a loan made by a regulated lending institution[4] when the loan is secured by improved real estate or

[1] Pub. L. 90-448, 82 Stat. 572 (1968).
[2] Pub. L. 93–234, 87 Stat. 975 (1973).
[3] These statutes are codified at 42 U.S.C. 4001-4129. The Federal Emergency Management Agency (FEMA) administers the NFIP; its regulations implementing the NFIP appear at 44 CFR parts 59-77.
[4] The FDPA defines "regulated lending institution" to mean any bank, savings and loan association, credit union, farm credit bank, Federal land bank association, production credit association, or similar institution subject to the supervision of a Federal entity for lending regulation. 42 U.S.C. 4003(a)(1).

a mobile home located in special flood hazard areas (SFHA) in which flood insurance is available under the NFIP.[5] The OCC, Board, FDIC, FCA, and NCUA (collectively, the Agencies) each have issued regulations implementing these statutory requirements for the lending institutions they supervise.[6] The Biggert-Waters Act[7] amended the NFIP requirements that the Agencies have authority to implement and enforce. Among other things, the Biggert-Waters Act: (1) required the Agencies to issue a rule regarding the escrow of premiums and fees for flood insurance;[8] (2) clarified the requirement to force place insurance;[9] and (3) required the Agencies to issue a rule to direct regulated lending institutions to accept "private flood insurance," as defined by the Biggert-Waters Act, and to notify borrowers of the availability of private flood insurance.[10]

B. Regulatory History

In October 2013, the Agencies jointly issued proposed rules to implement the escrow, force placement, and private flood insurance provisions of the Biggert-Waters Act (the October 2013 Proposed Rule).[11] In March 2014, the Homeowner Flood Insurance Affordability Act (HFIAA)[12] was enacted, which, among other things, amended the Biggert-Waters Act requirements regarding the escrow of flood insurance premiums and fees and created a new exemption from the mandatory flood insurance purchase requirements for certain detached

[5] An SFHA is an area within a flood plain having a one percent or greater chance of flood occurrence in any given year. 44 CFR 59.1. SFHAs are delineated on maps issued by the FEMA for individual communities. 44 CFR part 65. A community establishes its eligibility to participate in the NFIP by adopting and enforcing flood plain management measures that regulate new construction and by making substantial improvements within its SFHAs to eliminate or minimize future flood damage. 44 CFR part 60.
[6] See 12 CFR part 22 (OCC), part 208 (Board), part 339 (FDIC), part 614 (FCA), and part 760 (NCUA).
[7] Pub. L. 112-141, 126 Stat. 916 (2012).
[8] Section 100209 of the Biggert-Waters Act, amending section 102(d) of the FDPA (42 U.S.C. 4012a(d)).
[9] Section 100244 of the Act, amending section 102(e) of the FDPA (42 U.S.C. 4012a(e)).
[10] Section 100239 of the Biggert-Waters Act, amending section 102(b) of the FDPA (42 U.S.C. 4012a(b)) and section 1364(a)(3)(C) of the 1968 Act (42 U.S.C. 4104a(a)(3)(C)).
[11] 78 FR 65108 (Oct. 30, 2013).
[12] Pub. L. 113-89, 128 Stat. 1020 (2014).

structures. Accordingly, the Agencies jointly issued a new proposed rule in October 2014 to implement the new escrow and detached structure provisions.[13] In July 2015, the Agencies jointly issued final rules to implement the escrow and detached structure provisions of HFIAA and the force-placed flood insurance provisions of the Biggert-Waters Act.[14] Based on comments received in response to the October 2013 Proposed Rule, and the statutory effective date for the escrow provisions, the Agencies decided to finalize the escrow and force-placed insurance provisions and to revise and re-propose the private flood insurance provisions.

The October 2013 Proposed Rule would have required a regulated lending institution to accept all coverage meeting the statutory definition of "private flood insurance" in the Biggert-Waters Act. The Agencies requested comment on various issues related to this requirement. In particular, the Agencies sought comment on the inclusion of a safe harbor that would allow lenders to rely on the expertise of State insurance regulators to determine whether a policy meets the definition of private flood insurance and must be accepted by a lender. Additionally, the Agencies asked whether the rule should include a provision expressly permitting regulated lending institutions to accept, at their discretion, flood insurance provided by private insurers that does not meet the Biggert-Waters Act's definition of private flood insurance (discretionary acceptance). The Agencies also solicited comment on what criteria the Agencies might require for such a policy.

The Agencies received 81 written comments on the October 2013 Proposed Rule, including 51 comments addressing some aspect of private flood insurance. These commenters addressed specific issues, such as: the regulatory definition of "private flood insurance," the use of a regulatory safe harbor to facilitate compliance by regulated lending institutions, whether

[13] 79 FR 64518 (Oct. 30, 2014).
[14] 80 FR 43216 (July 21, 2015).

private flood insurance that does not conform to the statutory definition of the term should be accepted by regulated lending institutions, whether alternative criteria for such non-conforming private flood insurance should be developed by the Agencies, and whether regulated lending institutions should be permitted to accept certain non-traditional, non-conforming flood insurance coverage, such as Amish Aid plans.

This proposal addresses the private flood insurance provisions of the Biggert-Waters Act.[15] The preamble discusses comments received in response to the October 2013 Proposed Rule, as appropriate, in the section-by section analysis, below.

II. Section-by-Section Analysis

A. Definitions.

Mutual aid society. As discussed below, the Agencies are proposing a provision that would permit regulated lending institutions to accept, at their discretion and under certain circumstances, a flood insurance policy issued by a private insurer that does not meet the definition of "private flood insurance" in the Biggert-Waters Act. This provision includes specific standards for the acceptance of flood policies issued by mutual aid societies. In connection with this provision, the Agencies are proposing to add a definition of "mutual aid society" to their rules. Under the proposed definition, to qualify as a mutual aid society, an organization would need to meet three criteria: (1) the members must share a common religious, charitable, educational, or fraternal bond; (2) the organization must cover losses caused by damage to members' property including damage caused by flooding, pursuant to an agreement, in accordance with this common bond; and (3) the organization must have a demonstrated

[15] In connection with the issuance of this proposal, the Agencies have coordinated and consulted with the Federal Financial Institutions Examination Council (FFIEC), as required by certain provisions of the flood insurance statutes. See 42 U.S.C. 4012a(b)(1). Four of the five Agencies (OCC, Board, FDIC, and NCUA) are members of the FFIEC.

history of fulfilling the terms of agreements to cover losses to members' property caused by flooding. This proposed definition would ensure that only established organizations that consist of members with similar delineated goals or purposes, that have agreed to cover damage caused by flooding, and that have adequately covered flood losses in the past could be considered a "mutual aid society."

The Agencies request specific comment on whether the terms of this proposed definition adequately cover the types of organizations that should be considered "mutual aid societies" for purposes of the discretionary acceptance provision in this proposed rule. Specifically, the Agencies request comment on whether the proposed criteria are too broad or too narrow, and, if so, whether the final rule should include alternative, or additional, criteria.

Private flood insurance. The proposed rule would amend the Definitions section to include the definition of "private flood insurance" specified in section 100239 of the Biggert-Waters Act, which added a new section 102(b)(7) to the FDPA. The proposed rule would define "private flood insurance" consistent with the statutory definition, with some clarifying edits, to mean an insurance policy that:

1. Is issued by an insurance company that is 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; or, 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 State 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 (SFIP), including when considering deductibles, exclusions, and conditions offered by the insurer;[16]

3. Includes a requirement for the insurer to give written notice 45 days before cancellation or non-renewal of flood insurance coverage to the insured and the regulated lending institution, or a servicer acting on the institution's behalf;

4. Includes information about the availability of flood insurance coverage under the NFIP;

5. Includes a mortgage interest clause similar to the clause contained in an SFIP;

6. Includes a provision requiring an insured to file suit not later than one year after the date of a written denial for all or part of a claim under a policy; and

7. Contains cancellation provisions that are as restrictive as the provisions contained in an SFIP.

The proposed rule would define "SFIP" to mean a standard flood insurance policy issued under the NFIP in effect as of the date the private policy is provided to a regulated lending institution. The Agencies request comment on whether this is the correct time-frame for determining what version of the SFIP the regulated lending institution should use to evaluate the private policy. As discussed in more detail below, the proposed rule also contains criteria that regulated lending institutions would apply to determine whether a policy's coverage is "at least as broad as" SFIP coverage.

[16] When determining whether coverage is at least as broad as coverage provided under an SFIP policy, regulated lenders should compare like policies (e.g., a policy covering a one- to four-family residence or a single family dwelling unit in a condominium to an SFIP dwelling policy, a policy covering all other buildings except residential condominium buildings to an SFIP general property policy, or a policy covering a residential condominium building to an SFIP Residential Condominium Building Association Policy).

The Agencies received a number of general comments in response to this definition of "private flood insurance" in the October 2013 Proposed Rule. One commenter argued that imposing a requirement on regulated lending institutions to evaluate a private flood insurance policy for compliance with the statutory definition would put such institutions in an untenable position: a failure to accept a compliant private policy would be considered a violation, while accepting a private policy that is later judged by an examiner to be non-compliant would also result in a violation with potential civil monetary penalties. Another commenter stated that private flood insurance is market-based, and that it is not realistic to require such coverage to duplicate NFIP terms.

The Agencies also received comments on the specific requirements in the definition. One commenter stated that the definition of "flood" included in some private flood insurance policies can differ from that of the NFIP, which has led to private policies being rejected by lenders and regulators. Some commenters asserted that the higher deductibles offered under many private flood insurance policies directly conflict with NFIP maximum deductibles. One of these commenters further noted that there are many instances when a higher deductible is reasonable on a policy purchased by a commercial business that has the financial capability to handle such a deductible. Another commenter noted that private flood insurance policies typically include a provision that details the maximum coverage amount, or aggregate limit, payable during the policy term. The statutory definition does not permit such maximum limits, which the commenter characterized as a major change that may not be acceptable to private insurers. One commenter also stated that the statute of limitations provision in the definition should be amended to allow for filing suit within two years after date of loss for commercial properties, not one year as in the definition.

The Agencies also received comments regarding the cancellation provision in the definition. One commenter asserted that the cancellation provision in the proposed definition is problematic because nothing in an SFIP provides a basis to cancel a policy. Another commenter recommended that the definition be amended to recognize the notice of cancellation standards for commercial properties (typically 10 or 30 days). A commenter also stated that notice of cancellation provisions should be allowed that are no more restrictive than provisions in commercial property forms. Another commenter noted that the requirement to provide 45 days written notice of cancellation or non-renewal of flood insurance coverage is problematic because very few private flood policies require this type of notice. This commenter specifically noted that lenders would be unable to accept private flood policies under this definition going forward, including those policies lenders have historically considered acceptable.

The Agencies note that the definition of "private flood insurance" included in the October 2013 Proposed Rule and in this current proposal is mandated by the Biggert-Waters Act. Therefore, the Agencies may not make substantive changes to this definition in our regulations. However, the issues raised in connection with this definition by commenters influenced the Agencies' development and inclusion of a proposed provision that would permit institutions at their discretion to accept a private flood policy that does not meet the definition of "private flood insurance" in the Biggert-Waters Act, as discussed below.

"At least as broad as." Many commenters on the October 2013 Proposed Rule also asserted that it would be difficult for institutions to determine whether private flood insurance coverage is "at least as broad as" the coverage provided under the SFIP, as required by statute. In response to these comments, the Agencies have proposed to clarify the meaning of this phrase. Specifically, the proposed definition of "private flood insurance" would provide that a policy is

"at least as broad as" the coverage provided under an SFIP if the policy, at a minimum: (1) defines the term "flood" to include the events defined as a "flood" in an SFIP; (2) covers both the mortgagor(s) and the mortgagee(s) as loss payees; (3) contains the coverage provisions specified in an SFIP, including those relating to building property coverage; personal property coverage, if purchased by the insured mortgagor(s); other coverages; and the increased cost of compliance; (4) for any total policy coverage amount up to the maximum available under the NFIP at the time the policy is provided to the lender, contains deductibles no higher than the specified NFIP maximum for the same type of property, and includes similar non-applicability provisions as under an SFIP; (5) provides coverage for direct physical loss caused by a flood and may exclude other causes of loss identified in an SFIP; any additional or different exclusions than those in an SFIP may only pertain to coverage that is in addition to the amount and type of coverage that could be provided by an SFIP; and (6) does not contain conditions that narrow the coverage that would be provided in an SFIP.

The Agencies believe these criteria would ensure that a private flood insurance policy provides coverage that would protect the collateral securing the mortgage loan, thereby protecting both the property owner and the regulated lending institution making the loan, to the same extent as a policy issued under the NFIP. The Agencies specifically request comment on whether these criteria facilitate a regulated lending institution's determination of whether flood insurance coverage is "at least as broad as" the coverage provided under the SFIP.

B. Requirement to purchase flood insurance.

This section currently sets forth the general requirement that a regulated lending institution shall not make, increase, extend, or renew any designated loan unless the building or mobile home and any personal property securing the loan is covered by flood insurance for the

term of the loan. The coverage amount must at least equal the lesser of the outstanding principal balance of the designated loan or the maximum limit of coverage available for the particular type of property under the 1968 Act (mandatory purchase requirement). It further provides that flood insurance coverage under the FDPA is limited to the building or mobile home and any personal property that secures a loan and not the land itself. A "designated loan" means a loan secured by a building or mobile home that is located or to be located in an SFHA in which flood insurance is available under the 1968 Act, as amended.

As in the October 2013 Proposed Rule, the Agencies are proposing to amend this section to implement section 102(b)(1)(B) of the FDPA, as added by section 100239(a)(1) of the Biggert-Waters Act, which requires that all regulated lending institutions accept "private flood insurance," as defined in the statute, if certain conditions are met. Specifically, the proposed rule includes a new provision that would require a regulated lending institution to accept a private flood insurance policy that meets both: (1) the statutory definition of "private flood insurance," and (2) the mandatory purchase requirement, described above.

C. Compliance aid for mandatory acceptance.

The October 2013 Proposed Rule proposed to add to the flood insurance regulations a safe harbor that would have allowed lenders to rely on a State insurance regulator's written determination that a particular private insurance policy satisfies the rule's definition of "private flood insurance" and, therefore, must be accepted by the lender in satisfaction of the mandatory purchase requirement. The Agencies included this safe harbor because of concern that many regulated lending institutions, especially small institutions, would have difficulty evaluating whether a flood insurance policy meets the definition of "private flood insurance" that must be accepted, given their lack of technical insurance expertise regarding flood insurance policies.

Commenters on the October 2013 Proposed Rule expressed considerable support for the inclusion of a safe harbor, with many noting that few lenders have the capacity to determine whether policies meet the required standards. However, some commenters criticized the specific safe harbor included in the proposal and suggested alternatives.

In particular, many commenters raised concerns about the feasibility of State insurance regulators determining if private flood insurance is compliant with the Biggert-Waters Act, a Federal statute. Commenters noted there currently is no mechanism or process for a State insurance regulator to make such a determination. They further noted that even if such a mechanism is developed, States might not implement it consistently and it could lead to fifty different State standards. Many commenters also indicated that a State insurance regulator does not directly supervise providers of surplus lines insurance and, therefore, the safe harbor would not be available for surplus lines insurers.

State insurance regulators raised many of the concerns regarding the proposed safe harbor. One State insurance regulatory agency stated that the proposed safe harbor should provide only a rebuttable presumption that the lender must accept the private flood insurance policy. Accordingly, the lender would not have to accept the policy if the lender or the lender's Federal supervisory agency determines that the policy does not meet the Federal legal standards for "private flood insurance." This commenter also noted that a State insurance regulator lacks the legal authority to certify that a private flood insurance policy complies with Federal law, but could inform the insurer if it sees something in the policy that would make it non-compliant with Federal law. The National Association of State Insurance Commissioners (NAIC) raised a similar objection. It stated that its members had raised concerns about the proposed safe harbor because it may not be possible for some State insurance regulators to determine whether a

private flood insurance policy satisfies the Federal statutory definition of the term because of the particular State laws under which they operate.

Another commenter noted that, even if included in the regulation, a lender would not always benefit from the safe harbor because a State may not have made a determination regarding a particular policy. In this case, a lender would have to determine whether private flood insurance is compliant, particularly with respect to the "as broad as" requirement.

Among the numerous alternative safe harbors suggested, some commenters recommended that, instead of a State insurance regulator, the insurance company should certify that the private flood insurance policy being provided meets the statutory definition. One commenter stated that the insurance company should not only certify compliance with Federal law requirements, but also indemnify the lender if the policy should prove not to comply with Federal law and result in a loss to the lender. Another commenter recommended that an insurer's certification should provide that the private flood insurance policy's coverage is "at least as broad as" that provided under the NFIP. Commenters also suggested that the Agencies provide model certification language or a certification checklist.

The Agencies believe that it would be appropriate for the rule to include a compliance aid provision to assist consumers and regulated lending institutions in determining whether and how a flood insurance policy meets the definition of "private flood insurance" and is therefore a policy that the institution is required to accept as long as it otherwise meets the mandatory purchase requirement. Therefore, after careful consideration, and based on the comments received on the proposed "safe harbor" under the October 2013 Proposed Rule, the Agencies have included in this proposed rule a compliance aid provision, which provides that a policy is deemed to meet the definition of "private flood insurance" if the following three criteria are met:

(1) the policy includes, or is accompanied by, a written summary that demonstrates how the policy meets the definition of private flood insurance by identifying the provisions of the policy that meet each criterion in the definition, and confirms that the insurer is regulated in accordance with that definition; (2) the regulated lending institution verifies in writing that the policy includes the provisions identified by the insurer in its summary and that these provisions satisfy the criteria included in the definition; and (3) the policy includes the following provision within the policy or as an endorsement to the policy: "This policy meets the definition of private flood insurance contained in 42 U.S.C. 4012a(b)(7) and the corresponding regulation" (assurance clause).

The Agencies believe that the first criterion of this proposed compliance aid provision, an insurance company's written summary demonstrating how the policy meets the definition of private flood insurance, would assist a regulated lending institution in reviewing flood insurance policies, which are often lengthy and complicated. By identifying provisions of the policy that meet each criterion in this definition, this summary would enable the institution to conduct expeditiously the verification process described in the second criterion. To satisfy the second criterion, a regulated lending institution would be required to perform its own due diligence before accepting the policy instead of solely relying on the insurance company's claim that the policy meets the statutory and regulatory definition of "private flood insurance." The third prong, the insurance company's statement that the policy complies with the definition of "private flood insurance," could provide the policy-holder and the regulated lending institution with recourse against the insurance company if the company fails to abide by the terms included in the definition of "private flood insurance."

The Agencies recognize that this provision does not relieve a regulated lending institution of the requirement to accept a policy that meets the definition of "private flood insurance" and the mandatory purchase requirement, even if the policy is not accompanied by a written summary and does not include an assurance clause. However, the Agencies believe that this provision would facilitate the ability of regulated institutions, as well as consumers, to recognize policies that a lender must accept and may encourage insurance providers to issue policies that meet these criteria.[17]

The Agencies request comment on all aspects of this proposed compliance aid provision. In particular, commenters should address whether the provision as proposed would assist regulated lending institutions in complying with the requirement to accept insurance policies that meet the definition of "private flood insurance." Furthermore, commenters should address whether each of the three criteria in this proposed provision is necessary and feasible. Moreover, the Agencies request comment on whether this provision may provide an incentive to insurance providers to demonstrate that their policy meets the definition of "private flood insurance" and, therefore, must be accepted by regulated lending institutions.

D. Discretionary acceptance.

In general. The Agencies are proposing to permit a regulated lending institution to exercise its discretion to accept certain types of flood insurance policies issued by a private insurer other than private flood insurance policies that an institution is required to accept. Although section 102(b)(1)(B) of the FDPA, as added by section 100239(a)(1) of the Biggert-

[17] We note that this provision is not a "safe harbor" as generally understood. Because the statute mandates that regulated institutions accept any private flood insurance policy that meets the statutory definition of "private flood insurance" (provided it meets the mandatory purchase requirement), the provision would not reduce or eliminate liability if a lender failed to accept a policy that met the requirements in the statutory definition of private flood insurance. Therefore, we have not used the term "safe harbor" in this proposal.

Waters Act, requires a regulated lending institution to accept "private flood insurance" as that term is defined by statute, the Agencies note that the statute is silent about whether a regulated lending institution may accept a flood insurance policy issued by a private insurer that does not meet the statutory definition. The Agencies believe that the Congressional intent of the statute was to stimulate the private flood insurance market and, therefore, the statute should be construed to permit discretionary acceptance of flood insurance policies issued by private insurers that do not meet the statutory definition requiring mandatory acceptance.[18]

Additionally, in the October 2013 Proposed Rule, the Agencies specifically requested comment on whether the Agencies should include a provision allowing lenders to exercise discretion in accepting a flood insurance policy issued by a private insurer that does not meet the statutory definition, but otherwise would provide flood coverage consistent with the FDPA, and a majority of commenters were supportive. Among other reasons, commenters suggested that permitting discretionary acceptance would promote a diverse market for flood insurance policies issued by private insurers; reduce delays in lenders' analyses of policies; and limit the likelihood of lender confusion if NFIP requirements included in the definition of "private flood insurance" change. Moreover, as noted above, commenters stated that it would be difficult for many policies to meet the statutory definition of "private flood insurance" in the Biggert-Waters Act.

In addition to soliciting comment on whether the rule should specifically state that regulated lending institutions may accept flood insurance policies issued by private insurers that do not meet all of the statutory criteria for "private flood insurance," the Agencies asked whether some criteria should be required for such policies. The Agencies received comments with

[18] The Biggert-Waters Act's reforms were designed to improve the NFIP's financial integrity and stability as well as to "increase the role of private markets in the management of flood insurance risk." H. Rep. No. 112-102, at 1 (2011); see also 158 Cong. Rec. H4622 (daily ed. June 29, 2012) (statement of Rep. Biggert).

various views on the imposition of such criteria. This proposed rule adds criteria intended to address some of the comments received.

Consequently, in addition to requiring regulated lending institutions to accept private flood insurance policies that comply with the statutory definition of "private flood insurance," the proposed rule would expressly permit a regulated lending institution to accept other types of flood insurance policies issued by private insurers, provided the following criteria are met.[19]

First, under the proposed rule, the flood insurance policy issued by a private insurer would be required to be issued by an insurer that is licensed, admitted, or otherwise approved to engage in the business of insurance by the insurance regulator of the State in which the property to be insured is located. In the case of a policy of difference in conditions, multiple peril, all risk, or other blanket coverage insuring nonresidential commercial property, the flood insurance issued by a private insurer would be required to be issued by a surplus lines insurer recognized, or not disapproved, by the insurance regulator of the State where the property to be insured is located. This criterion is included in the definition of "private flood insurance" in the Biggert-Waters Act, and the Agencies believe it is appropriate to include it as a criterion for discretionary acceptance as well. Because State insurance regulators, as the functional regulators of insurance companies, may be in the best position to evaluate the financial condition and ability of a private insurer to meet its obligations under a flood insurance policy, the Agencies believe this proposed criterion would safeguard both the consumer purchasing the policy and the regulated lending institution issuing a loan for which the insured property serves as collateral.

[19] The Agencies have included this provision pursuant to their authority under the FDPA to issue regulations directing lending institutions not to make, increase, extend, or renew any loan secured by property located in an SFHA unless the property is covered by "flood insurance." See 42 U.S.C. 4012a(b).

Second, under the proposed rule, the flood insurance policy issued by a private insurer would be required to cover both the mortgagor(s) and the mortgagee(s) as loss payees. This proposed criterion would ensure that the flood policy protects both the property owner and the regulated lending institution issuing the mortgage loan.

Third, the proposal would require that a flood insurance policy issued by a private insurer must provide for cancellation following reasonable notice to the borrower only for reasons permitted by FEMA for an SFIP on the Flood Insurance Cancellation Request/Nullification Form, in any case of non-payment, or when cancellation is mandated pursuant to State law. This proposed criterion would ensure that a policy is cancelled only for limited reasons and that the policyholder receives reasonable notification of cancellation.

Finally, the proposal would require that a flood insurance policy issued by a private insurer must either be "at least as broad" as the coverage provided under an SFIP, as defined above, or provide coverage that is "similar" to coverage provided under an SFIP, including when considering deductibles, exclusions, and conditions offered by the insurer. In determining whether the coverage is similar to coverage provided under an SFIP, the proposal would require the regulated lending institution to: (1) compare the private policy with an SFIP to determine the differences between the private policy and an SFIP; (2) reasonably determine that the private policy provides sufficient protection of the loan secured by the property located in an SFHA; and (3) document its findings. The Agencies believe these proposed criteria would provide safeguards so that a regulated lending institution does not accept policies that do not sufficiently protect the collateral securing the loan.

The Agencies believe that the proposed discretionary acceptance provision provides regulated lending institutions with greater flexibility to accept flood insurance policies that do

not contain all of the requirements included in the definition of "private flood insurance." Specifically, under this provision, regulated lending institutions would be able to accept a flood insurance policy issued by a private insurer that: (1) does not contain a mortgage interest clause similar to the clause contained in an SFIP, provided that the policy covers the mortgagor and the mortgagee;[20] (2) does not contain information about the availability of flood insurance coverage under the NFIP; (3) provides for cancellation of the policy following "reasonable notice" to the borrower instead of requiring 45 days prior written notice for cancellation or non-renewal; (4) permits cancellation of the policy for reasons of nonpayment or when State law mandates cancellation, in addition to the reasons for cancellation permitted in an SFIP; and (5) does not contain a provision requiring an insured to file suit not later than one year after the date of a written denial of all or part of a claim under the policy. In addition, with respect to deductibles, exclusions, and conditions, coverage under a policy accepted pursuant to the proposed discretionary acceptance provision could be "similar to" an SFIP instead of "at least as broad as" an SFIP, provided the institution documents that it has compared the differences between the policy and an SFIP and that it has reasonably determined that the private policy provides sufficient protection of the loan secured by the property to be insured.

The Agencies solicit comment as to whether these proposed criteria are appropriate for regulated lending institutions accepting flood insurance policies issued by a private insurer that do not meet the statutory definition of "private flood insurance." In particular, the Agencies seek comment on whether the proposed criteria are compatible with industry practice, or whether the

[20] The SFIP mortgage interest clause ensures that any loss payable will be paid to any mortgagee named in the NFIP policy application and declarations page, as well as any other mortgagee or loss payee determined to exist at the time of the loss. We note that this differs from a clause covering both the mortgagor and the mortgagee, who are named in the policy.

proposed criteria would exclude currently accepted policies or significantly limit the growth of the market for flood insurance policies issued by private insurers.

Separately, the Agencies request comment in three other areas related to the proposed discretionary acceptance criteria: (1) whether the phrase "sufficient protection of the loan" is adequately clear, (2) whether the proposed criteria raise any safety and soundness risks for regulated lending institutions, and (3) whether the proposed criteria raise any consumer protection issues.

Exception for mutual aid societies. The proposed rule also includes an exception for certain private flood coverage provided by mutual aid societies. This proposed exception is intended to be responsive to several commenters on the October 2013 Proposed Rule that supported adding provisions permitting regulated lending institutions to accept certain non-traditional coverage that does not satisfy the statutory definition for "private flood insurance," such as Amish Aid plans, even though this coverage is not provided by a State-regulated insurance company. Under this proposed exception, flood protection offered by mutual aid societies that would not meet all of the above requirements for discretionary acceptance could continue to be offered, for example, to members of religious communities who do not purchase insurance from traditional insurance companies, provided certain conditions are met.

Specifically, the proposed rule would permit a regulated lending institution to accept a private policy issued by a mutual aid society in satisfaction of the mandatory flood insurance purchase requirement if: (1) the institution's primary supervisory agency determines that such policy or types of policies meet the requirement for flood insurance for purposes of the Federal flood insurance statutes; (2) the policy meets the amount of coverage for losses and term requirements in the mandatory flood insurance purchase requirement; (3) the policy covers both

the mortgagor(s) and the mortgagee(s) as loss payees; and (4) the regulated lending institution has determined that the policy provides sufficient protection of the loan secured by the property located in an SFHA.

In determining whether a policy issued by a mutual aid society provides sufficient protection of the loan under the proposed rule, the regulated lending institution would be required to: (1) verify that the policy is consistent with general safety and soundness principles, such as whether deductibles are reasonable based on the borrower's financial condition; (2) consider the policy provider's ability to satisfy claims, such as whether the policy provider has a demonstrated record of covering losses; and (3) document its conclusions.

Under the proposed rule, each Agency would use its discretion individually to determine whether policies offered by mutual aid societies qualify as flood insurance for purposes of the Federal flood insurance statutes. The OCC and FCA propose to conduct their own evaluations using the criteria that institutions are expected to consider under 12 CFR 22.3(c)(4) or 12 CFR 614.4930(c)(4), respectively. Based on their current practices regarding non-traditional flood insurance plans, the Board, FDIC, and NCUA expect that cases in which they approve policies issued by mutual aid societies to be rare and limited.

The OCC notes that it currently permits national banks and Federal savings associations to accept flood coverage issued by Amish mutual aid societies, such as Amish Aid plans. Amish Aid societies consist of members who share a common religious bond and, in accordance with this common bond, have a demonstrated history of fulfilling the terms of agreements (Amish Aid plans) to cover losses to members' property caused by flooding in accordance with this common bond, either by paying to cover the cost of damaged structures or by repairing or rebuilding the structures. Amish Aid plans thereby provide sufficient protection of the loan secured by the

property and protect the lender as well as the borrower. The proposed rule, therefore, would maintain the status quo by continuing to allow national banks and Federal savings associations to accept flood coverage issued by mutual aid societies that have a demonstrated history of covering expenses caused by flood damage to members' property, and that is approved by the OCC, such as Amish Aid plans.

The Agencies request comment on the proposed requirements for discretionary acceptance of polices issued by mutual aid societies, including the proposed criteria a regulated lending institution would be required to consider in determining whether the policy provides sufficient protection for the loan.

Discretionary acceptance for nonresidential property. The mandatory flood insurance purchase requirement applies to loans secured by either residential or nonresidential properties. The Agencies understand that flood insurance policies issued by private insurers covering loans secured by nonresidential properties, such as commercial properties, may have coverage, deductibles, exclusions, and conditions that differ from NFIP policies based on the type, size, and number of nonresidential properties covered by the policy. In some instances, such policies are individually negotiated and tailored to the nonresidential property that secures a loan. The Agencies request comment on whether the proposed definition of "private flood insurance" or the proposed discretionary acceptance provision, both of which include specific requirements with respect to deductibles, exclusions, conditions, and cancellation, would prevent regulated lending institutions from accepting flood insurance policies issued by private insurers in the nonresidential lending context, even though coverage not including these requirements would be acceptable for policies covering another type of risk, such as fire or wind.

Furthermore, the Agencies request comment on whether the final rule should include criteria for the discretionary acceptance of flood insurance policies issued by private insurers for nonresidential properties that are different from the criteria applicable to flood insurance policies issued by private insurers for residential properties. For example, the Agencies could require that the policy: (1) meet the amount of coverage for losses and term requirements specified in the mandatory purchase requirement, (2) cover both the mortgagor(s) and the mortgagee(s) as loss payees, and (3) require the regulated institution to determine that the policy provides sufficient protection of the loan secured by the property, consistent with general safety and soundness principles, as is required for the acceptance of coverage provided by mutual aid societies. The Agencies request comment on whether a provision for flood insurance issued by private insurers covering nonresidential properties that includes these criteria is appropriate or whether different or additional criteria should be applied in the nonresidential context. For example, should the Agencies require the policy to be issued by an insurer that is licensed, admitted, or otherwise approved to engage in the business of insurance by the insurance regulator of the State where the property to be insured is located, or issued by a surplus lines insurer recognized, or not disapproved, by the insurance regulator of the State where the property to be insured is located?

III. Regulatory Analysis

A. Regulatory Flexibility Act.

OCC: In general, the Regulatory Flexibility Act (RFA) requires that in connection with a notice of proposed rulemaking an agency prepare and make available for public comment an initial regulatory flexibility analysis that describes the impact of a proposed rule on small

entities.[21] Under section 605(b) of the RFA, this analysis is not required if an agency certifies that the rule would not have a significant economic impact on a substantial number of small entities and publishes its certification and a short explanatory statement in the Federal Register along with its rule.

The OCC currently supervises approximately 1,032 small entities.[22] We identified 974 OCC-supervised small entities that may be impacted by the proposed rule, which is a substantial number.[23] The OCC classifies the economic impact of total costs on a bank as significant if the total costs in a single year are greater than 5 percent of total salaries and benefits, or greater than 2.5 percent of total non-interest expense. The OCC estimates that the average cost per small bank is approximately $10,400 per year. Using this cost estimate, we believe the proposed rule will have a significant economic impact on four small banks, which is not a substantial number. Therefore, the OCC certifies that this regulation, if adopted, will not have a significant economic impact on a substantial number of small entities supervised by the OCC. Accordingly, a Regulatory Flexibility Analysis is not required.

Board: The RFA requires an agency to publish an initial regulatory flexibility analysis with a proposed rule or certify that the proposed rule will not have a significant economic impact

[21] See 5 U.S.C. 601 et seq.

[22] We base our estimate of the number of small entities on the Small Business Administration's size thresholds for commercial banks and savings institutions, and trust companies, which are $550 million and $38.5 million, respectively. Consistent with the General Principles of Affiliation 13 CFR §121.103(a), we count the assets of affiliated financial institutions when determining if we should classify an institution we supervise as a small entity. We used December 31, 2015, to determine size because a "financial institution's assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year." See footnote 8 of the U.S. Small Business Administration's *Table of Size Standards*.

[23] To estimate the number of small banks that may be affected if the proposed rule is implemented, we determined the number of small banks that (a) self-identify by reporting mortgage servicing assets, reporting loans secured by real estate, or as originating 1-4 family residential mortgage loans on a Call Report submitted for any quarter in calendar year 2015 or during the first quarter of 2016 or (b) are identified by OCC examiners as originating residential mortgage loans or as Home Mortgage Disclosure Act filers.

on a substantial number of small entities. The Board is publishing an initial regulatory flexibility analysis and requests public comment on all aspects of its analysis. The Board will conduct a final regulatory flexibility analysis after considering the comments received during the public comment period.

1. Statement of the need for, and objectives of, the proposed rule. The Board is proposing revisions to Regulation H to implement the private flood insurance provisions of the Biggert-Waters Act. Consistent with the Biggert-Waters Act, the proposal would require regulated lending institutions accept any private insurance policy that meets the Biggert-Waters Act's definition of "private flood insurance" in satisfaction of the mandatory flood insurance purchase requirement. The proposed rule would also include a compliance aid that would deem a policy to meet the Biggert-Waters Act definition of "private flood insurance" if: (i) the policy includes, or is accompanied by, a written summary from the insurer that demonstrates how the policy meets the definition of private flood insurance; (ii) the lender verifies that the policy includes the provisions identified in the summary; and (iii) the policy includes language certifying that the policy meets the criteria. The Agencies are also proposing to permit lenders to accept, at their discretion, flood insurance policies issued by private insurers, and plans issued by mutual aid societies, that do not meet the definition of "private flood insurance," provided they meet certain conditions.

2. Small entities affected by the proposed rule. All State member banks that are subject to the Federal flood insurance statutes and the flood insurance provisions of Regulation H would be subject to the proposed rule. As of September 27, 2016, there were 821 State member banks. Under regulations issued by the Small Business Administration (SBA), banks and other

depository institutions with total assets of $550 million or less are considered small. Approximately 588 State member banks would be considered small entities by the SBA.[24]

The Board believes the proposal will not have a significant impact on small entities. First, the Board believes that most existing flood insurance policies issued by private insurers would not meet the definition of "private flood insurance" under the Biggert-Waters Act and that insurers would request that lenders accept the policies under the more flexible proposed discretionary acceptance provisions. The proposed provisions on discretionary acceptance, including plans issued by mutual aid societies, are at the discretion of the lender. As a result, regulated lending institutions may choose not to accept policies under those proposed provisions and would therefore have no compliance burden associated with those provisions.

Second, with respect to flood insurance policies that a private insurer would seek to have a lender accept under the proposed mandatory acceptance provisions, the Board notes that for those regulated lending institutions, including those that are considered small entities, that accept flood insurance policies issued by private insurers today, such institutions already have experience evaluating such policies with the criteria in the Biggert-Waters Act definition of "private flood insurance," which are almost identical to the criteria referenced in guidance issued by the Agencies and that currently govern the acceptance of private policies by regulated lending institutions. Third, as discussed in the **SUPPLEMENTARY INFORMATION**, the Board believes the proposed rule would alleviate the burden on regulated lending institutions, including those that are considered small entities, of evaluating whether a flood insurance policy issued by a private insurer meets the definition of "private flood insurance" under the mandatory

[24] The Board reviewed the number of State member banks that reported mortgage servicing assets, loans secured by real estate, or originating 1-4 family residential mortgage loans on a Call Report submitted for the four quarters ending on June 30, 2016, which included nearly all State member banks. Consequently, the Board is estimating that all small State member banks may be affected if the proposed rule is implemented.

acceptance provisions with the addition of a proposed compliance aid that leverages the expertise of the insurer issuing the policy.

Although the proposed rule could impact a substantial number of small entities, the Board estimates that the costs to these entities will not be significant. The Board estimates that the cost for each covered small entity will be approximately $8,096 during the first year the proposal goes into effect. This estimate includes first year compliance costs[25] and ongoing costs[26] and assumes that the usage of private flood insurance policies by borrower, as defined by the proposed rule, is distributed consistently across small entities. The actual ongoing cost estimate may be lower than stated because the estimate assumes that all of the policies for properties in High Risk Area will cover loans held by Federal Reserve-supervised institutions when some of these loans may be held by institutions supervised by other Agencies.

3. Other Federal rules. The Board has not identified any likely duplication, overlap and/or potential conflict between the proposed rule and any Federal rule.

4. Significant alternatives to the proposed revisions. The Board solicits comment on any significant alternatives that would reduce the regulatory burden associated with this proposed rule on small entities.

[25] Fixed compliance costs are estimated assuming each small entity requires one full-time employee working 20 hours at a rate of $101 an hour. The total cost of compliance for all 821 covered entities is approximately $1.658 million, or $2,020 for each small entity.

[26] Ongoing compliance costs are estimated based on available data. According to FEMA's *Policy and Claim Statistics for Flood Insurance* there are approximately 5,083,071 flood insurance policies nationally as of June 2016. Only 3,537,059 of these policies are located in "High Risk Areas" and would therefore require flood insurance. The Board estimated the future adoption rate of private flood insurance will be approximately 10 percent of the total of flood insurance policies in any given year. Further, small entities hold approximately 10 percent of all loans secured by real estate held in portfolio by all Federal Reserve-supervised banks as of June 30, 2016. The Board therefore assumed that small entities will have to review a similar share of annual private flood insurance policies. Ongoing policy review costs are estimated to be approximately $6,076 per year for each small entity, assuming one labor hour per year, per policy, at $101 per hour.

FDIC: The RFA generally requires that, in connection with a notice of proposed rulemaking, an agency prepare and make available for public comment an initial regulatory flexibility analysis describing the impact of the proposed rule on small entities.[27] A regulatory flexibility analysis is not required, however, if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The Small Business Administration has defined "small entities" to include banking organizations with total assets less than or equal to $550 million.[28]

The FDIC supervises 3,204 small banking entities that have originated 1-4 family residential mortgage loans or have reported holding mortgage servicing assets or loans secured by real estate and may therefore be affected by the proposed rule.[29] The FDIC estimates that the annual cost for each covered small entity will range between $2,020 and $4,500 per year, on average. This estimate includes compliance costs[30] and ongoing costs[31] and assumes that the usage of private flood insurance policies by borrowers, as defined by the proposed rule, is distributed consistently across small entities. The actual ongoing cost estimates are likely to be lower than stated because the estimate assumes that all of the loans for properties in High Risk

[27] 5 U.S.C. §§ 601 *et seq*.
[28] 13 CFR 121.201 (as amended, effective December 2, 2014).
[29] FDIC Call Reports (four quarters ending on March 31st, 2016).
[30] Fixed compliance costs are estimated assuming each small entity requires one full-time employee working 20 hours at a rate of $101 an hour. The total cost of compliance for all 3,204 covered entities is approximately $6.5 million, or $2020 for each small entity.
[31] Ongoing compliance costs are estimated based on available data. According to FEMA's *Policy and Claim Statistics for Flood Insurance* there are approximately 5,118,254 flood insurance policies nationally as of March 2016. Only 3,568,638 of these policies are located in "High Risk Areas" and would therefore require flood insurance. The FDIC estimated the future adoption rate of private flood insurance will be between 1 percent and 10 percent of the total of flood insurance policies in any given year. Further, small entities hold approximately 22 percent of all loans secured by real estate held in portfolio by all FDIC-supervised banks as of March 31, 2016. The FDIC therefore assumed that small entities will have to review a similar share of annual private flood insurance policies. Ongoing policy review costs are estimated to be between $250 and $2,500 per year for each small entity, assuming one labor hour per year, per policy, at $101 per hour.

Areas are held by FDIC-supervised institutions; at least some of these loans are held by OCC- and Board-supervised institutions.

The proposed rule could impact a substantial number of small entities; however, the costs to those entities are not estimated to be significant. For this reason, the FDIC certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities that it supervises.

FCA: Pursuant to section 605(b) of the RFA, the FCA hereby certifies that the final rule will not have a significant economic impact on a substantial number of small entities. Each of the banks in the Farm Credit System, considered together with its affiliated associations, has assets and annual income in excess of the amounts that would qualify them as small entities. Therefore, Farm Credit System institutions are not "small entities" as defined in the RFA.

NCUA: The RFA requires NCUA to prepare an analysis to describe any significant economic impact a regulation may have on a substantial number of small entities.[32] Under section 605(b) of the RFA, this analysis is not required if an agency certifies that the rule would not have a significant economic impact on a substantial number of small entities and publishes its certification and a short explanatory statement in the Federal Register along with its rule.[33] For purposes of this analysis, NCUA considers small credit unions to be those having under $100 million in assets.[34] As of June 30, 2016, there are 4,345 small, federally insured credit unions, and only about 2,894 of these credit unions have real estate loans.

NCUA classifies the economic impact of total costs on a credit union as significant if the total costs in a single year are greater than 5 percent of total salaries and benefits, or greater than

[32] 5 U.S.C. 603(a).
[33] 5 U.S.C. 605(b).
[34] 80 FR 57512 (September 24, 2015).

2.5 percent of total non-interest expense. NCUA estimates that the average cost per small credit union is approximately $2,020 per year. Using this cost estimate, NCUA believes the proposed rule will have a significant economic impact on 63 small credit unions, which is not a substantial number. Therefore, NCUA certifies that this proposed rule, if adopted, will not have a significant economic impact on a substantial number of small entities.

B. Unfunded Mandates Reform Act of 1995.

The OCC has analyzed the proposed rule under the factors in the Unfunded Mandates Reform Act of 1995 (UMRA).[35] Under this analysis, the OCC considered whether the proposed rule includes a Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year (adjusted annually for inflation). Under Title II of the UMRA, indirect costs, foregone revenues and opportunity costs are not included when determining if a mandate meets or exceeds UMRA's cost threshold. The UMRA does not apply to regulations that incorporate requirements specifically set forth in law.

The OCC's estimated annual UMRA cost is approximately $36 million. Therefore, the OCC finds that the proposed rule does not trigger the UMRA cost threshold. Accordingly, the OCC has not prepared the written statement described in section 202 of the UMRA.

C. Paperwork Reduction Act of 1995

The OCC, Board, FDIC, and NCUA (the Agencies)[36] have determined that this proposed rule involves a collection of information pursuant to the provisions of the Paperwork Reduction Act of 1995 (the PRA) (44 U.S.C. 3501 et seq.).

[35] Pub. L. 104-4, 109 Stat. 48 (1995), codified at 2 U.S.C. 1501 et seq.

[36] The FCA has determined that the proposed rule does not involve a collection of information pursuant to the PRA for System institutions because System institutions are Federally chartered instrumentalities of the United States and

In accordance with the PRA (44 U.S.C. 3506; 5 CFR 1320 Appendix A.1), the Board reviewed the proposed rule under the authority delegated to the Board by the Office of Management and Budget (OMB). The collection of information that is subject to the PRA by this proposed rule is found in 12 CFR 22.3, 208.25, 339.3, and 760.3.

The Agencies may not conduct or sponsor, and an organization is not required to respond to, this information collection unless the information collection displays a currently valid OMB control number. The OMB control numbers are 1557-0326 (OCC), 7100-0280 (Board), and 3133-0143 (NCUA). The FDIC will seek a new OMB control number.

Under §§ 22.3(c)(2)(i), 208.5(c)(3)(ii)(A), 339.3(c)(2)(i), and 760.3(c)(2)(i), a policy is deemed to meet the definition of private flood insurance if the policy includes, or is accompanied by, a written summary demonstrating how the insurer and the policy complies with certain criteria.

Under §§ 22.3(c)(2)(ii), 208.5(c)(3)(ii)(B), 339.3(c)(2)(ii), and 760.3(c)(2)(ii), institutions must accept private flood insurance in satisfaction of the flood insurance purchase requirement, provided that it (i) meets the requirement for coverage, including a written summary demonstrating that the policy contains each criterion included in the definition of private flood insurance, (ii) the specific provisions in the policy are identified, and (iii) the insurer is regulated in accordance with the definition. An institution must verify in writing that the policy includes

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instrumentalities of the United States are specifically excepted from the definition of "collection of information" contained in 44 U.S.C. 3502(3).

the provisions identified by the insurer in the summary and that these provisions satisfy the criteria included in the definition.

Under §§ 22.3(c)(3)(iv)(B)(3), 208.5(c)(3)(iii)(D)(2)(iii), 339.3(c)(3)(iv)(B)(3), and 760.3(c)(3)(iv)(B)(3), institutions have the discretion to accept a flood insurance policy issued by a private insurer that is not issued under the NFIP and does not meet the definition of private flood insurance if the coverage meets certain amount and term requirements and the policy provides coverage that is similar to coverage provided under an SFIP, including, when considering deductibles, exclusions, and conditions offered by the insurer, and the institution has documented its findings.

Under §§ 22.3(c)(4)(iv)(C), 208.5(c)(iv)(D)(3), 339.3(c)(4)(iv)(C), and 760.3(c)(4)(iv)(C), institutions may accept a private policy issued by a mutual aid society provided it has determined that the policy provides sufficient protection of the loan secured by the property located in the special flood hazard area and documented its conclusions.

Burden Estimates

OCC:

Number of Respondents: 1,341.

Total Burden: 129,968 hours.

Board:

Number of Respondents: 846

Total Burden: 42,050 hours

FDIC:

Number of Respondents: 3,885

Total Burden: 136,100 hours

NCUA:

Number of Respondents: 4,058

Total Burden: 95,211 hours

These collections are available to the public at www.reginfo.gov.

(a) Whether the information collections are necessary for the proper performance of the Agencies' functions, including whether the information has practical utility;

(b) The accuracy of the Agencies' estimates of the burden of the information collections, including the validity of the methodology and assumptions used;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of information collections on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

D. Riegle Community Development and Regulatory Improvement Act of 1994.

Section 302(a) of the Riegle Community Development and Regulatory Improvement Act of 1994 (RCDRIA)[37] requires that each Federal banking agency,[38] in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions, consider,

[37] 12 U.S.C. 4802(a).

[38] For purposes of RCDRIA, "Federal banking agency" means the OCC, FDIC, and Board. See 12 U.S.C. 4801.

consistent with principles of safety and soundness and the public interest, any administrative burdens that such regulations would place on depository institutions, including small depository institutions, and customers of depository institutions, as well as the benefits of such regulations. In addition, new regulations that impose additional reporting, disclosures, or other new requirements on insured depository institutions generally must take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form.

The Federal banking agencies note that comment on these matters has been solicited in other sections of this **SUPPLEMENTARY INFORMATION** section, and that the requirements of RCDRIA will be considered as part of the overall rulemaking process. In addition, the Federal banking agencies invite any other comments that further will inform the Federal banking agencies' consideration of RCDRIA.

List of Subjects

12 CFR Part 22

Flood insurance, Mortgages, National banks, Reporting and recordkeeping requirements, Savings associations.

12 CFR Part 208

Accounting, Agriculture, Banks, banking, Confidential business information, Crime, Currency, Federal Reserve System, Flood insurance, Mortgages, Reporting and recordkeeping requirements, Securities.

12 CFR Part 339

Flood insurance, Reporting and recordkeeping requirements, Savings associations.

12 CFR Part 614

Agriculture, Banks, banking, Flood insurance, Foreign trade, Reporting and recordkeeping requirements, Rural areas.

12 CFR Part 760

Credit unions, Mortgages, Flood insurance, Reporting and Recordkeeping requirements.

Federal Deposit Insurance Corporation

12 CFR CHAPTER III

Authority and Issuance

For the reasons set forth in the joint preamble, the Board of Directors of the FDIC amends part 339 of chapter III of title 12 of the Code of Federal Regulations to read as follows:

6. The authority citation for part 339 continues to read as follows:

AUTHORITY: 12 U.S.C. 1462a, 1463, 1464, 1819 (Tenth), 5412(b)(2)(C) and 42 U.S.C. 4012a, 4104a, 4104b, 4106, and 4128.

7. Section 339.2 is amended by:

a. Re-designating paragraphs (h) and (i) as paragraphs (i) and (j), paragraphs (j) and (k) as (l) and (m), and (l) and (m) as (o) and (p); and

b. Adding new paragraphs (h), (k) and (n) to read as follows:

§ 339.2 Definitions.

*** * * * ***

(h) Mutual aid society means an organization–

(1) Whose members share a common religious, charitable, educational, or fraternal bond;

(2) That covers losses caused by damage to members' property pursuant to an agreement, including damage caused by flooding, in accordance with this common bond; and

(3) That has a demonstrated history of fulfilling the terms of agreements to cover losses to members' property caused by flooding.

* * * * *

(k) 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 property to be insured is located, by the insurance regulator of that State or jurisdiction; or

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

(2) Provides flood insurance coverage that is at least as broad as the coverage provided under an SFIP, including when considering deductibles, exclusions, and conditions offered by the insurer. For purposes of this part, a policy is at least as broad as the coverage provided under an SFIP if, at a minimum, the policy:

(i) Defines the term "flood" to include the events defined as a "flood" in an SFIP;

(ii) Covers both the mortgagor(s) and the mortgagee(s) as loss payees;

(iii) Contains the coverage and provisions specified in an SFIP, including those relating to building property coverage; personal property coverage, if purchased by the insured mortgagor(s); other coverages; and the increased cost of compliance;

(iv) Contains deductibles no higher than the specified maximum for the same type of property, and includes similar non-applicability provisions, as under an SFIP, for any total policy

coverage amount up to the maximum available under the NFIP at the time the policy is provided to the lender;

(v) Provides coverage for direct physical loss caused by a flood and may exclude other causes of loss identified in an SFIP. Any additional or different exclusions than those in an SFIP may pertain only to coverage that is in addition to the amount and type of coverage that could be provided by an SFIP; and

(vi) May not contain conditions that narrow the coverage provided in an SFIP;

(3) Includes all of the following:

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

(A) The insured; and

(B) The FDIC-supervised institution that made the designated loan secured by the property covered by the flood insurance, or the servicer acting on its behalf;

(ii) Information about the availability of flood insurance coverage under the NFIP;

(iii) A mortgage interest clause similar to the clause contained in an SFIP; and

(iv) A provision requiring an insured to file suit not later than one 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 an SFIP.

***** ***** ***** ***** *****

(n) SFIP means, for purposes of §§ 339.2 and 339.3, a standard flood insurance policy issued under the NFIP in effect as of the date the private policy is provided to an FDIC-supervised institution.

* * * * *

8. Section 339.3 is amended by adding paragraph (c) to read as follows:

§ 339.3 Requirement to purchase flood insurance where available.

* * * * *

(c) Private flood insurance. (1) Mandatory acceptance. An FDIC-supervised institution must accept private flood insurance, as defined in § 339.2(k), in satisfaction of the flood insurance purchase requirement, provided that the private flood insurance meets the requirement for coverage under paragraph (a) of this section.

(2) Compliance aid for mandatory acceptance. A flood insurance policy is deemed to meet the definition of private flood insurance in § 339.2(k) for purposes of paragraph (a) of this section if:

(i) The policy includes, or is accompanied by, a written summary that demonstrates how the policy meets the definition of private flood insurance in § 339.2(k) by identifying the provisions of the policy that meet each criterion in the definition, and confirms that the insurer is regulated in accordance with that definition;

(ii) The FDIC-supervised institution verifies in writing that the policy includes the provisions identified by the insurer in the summary provided pursuant to paragraph (c)(2)(i) of this section and that these provisions satisfy the criteria included in the definition; and

(iii) The policy includes the following provision within the policy or as an endorsement to the policy: “This policy meets the definition of private flood insurance contained in 42 U.S.C. 4012a(b)(7) and the corresponding regulation.”

(3) Discretionary acceptance. An FDIC-supervised institution may accept a flood insurance policy issued by a private insurer that is not issued under the NFIP and does not meet

the definition of private flood insurance, as defined in § 339.2(k), in satisfaction of the flood insurance purchase requirement under paragraph (a) of this section, only if the coverage under such flood insurance policy meets the amount and term requirements specified in paragraph (a) of this section, and the policy:

(i) Is issued by an insurer that is licensed, admitted, or otherwise approved to engage in the business of insurance in the State or jurisdiction in which the property to be insured is located by the insurance regulator of that State; or in the case of a policy of difference in conditions, multiple peril, all risk, or other blanket coverage insuring nonresidential commercial property, is issued by a surplus lines insurer recognized, or not disapproved, by the insurance regulator of the State where the property to be insured is located;

(ii) Covers both the mortgagor(s) and the mortgagee(s) as loss payees;

(iii) Provides for cancellation following reasonable notice to the borrower only for reasons permitted by FEMA for an SFIP on the Flood Insurance Cancellation Request/Nullification Form, in any case of non-payment, or when cancellation is mandated pursuant to State law; and

(iv) Either:

(A) Meets the criteria set forth in paragraphs (k)(2)(i) and (iii) through (vi) of this section; or

(B) Provides coverage that is similar to coverage provided under an SFIP, including when considering deductibles, exclusions, and conditions offered by the insurer, and the FDIC-supervised institution has:

(1) Compared the private policy with an SFIP to determine the differences between the private policy and an SFIP;

(2) Reasonably determined that the private policy provides sufficient protection of the loan secured by the property located in a special flood hazard area; and

(3) Documented its findings under paragraphs (c)(3)(iv)(B)(1) and (2) of this section.

(4) Exception for mutual aid societies. Notwithstanding the requirements of paragraph (c)(3) of this section, an FDIC-supervised institution may accept a private policy issued by a mutual aid society in satisfaction of the flood insurance purchase requirement under paragraph (a) of this section if:

(i) The FDIC has determined that such types of policies qualify as flood insurance for purposes of this Act;

(ii) The policy meets the amount of coverage for losses and term requirements specified in paragraph (a) of this section;

(iii) The policy covers both the mortgagor(s) and the mortgagee(s) as loss payees; and

(iv) The FDIC-supervised institution has determined that the policy provides sufficient protection of the loan secured by the property located in a special flood hazard area. In making this determination, the FDIC-supervised institution must:

(A) Verify that the policy is consistent with general safety and soundness principles, such as whether deductibles are reasonable based on the borrower's financial condition;

(B) Consider the policy provider's ability to satisfy claims, such as whether the policy provider has a demonstrated record of covering losses; and

(C) Document its conclusions.

[THIS SIGNATURE PAGE RELATES TO THE JOINT NOTICE OF PROPOSED RULEMAKING ENTITLED "LOANS IN AREAS HAVING SPECIAL FLOOD HAZARDS – PRIVATE FLOOD INSURANCE]

By order of the Board of Directors of the Federal Deposit Insurance Corporation.

_____
Robert E. Feldman
Executive Secretary

Dated at Washington, DC, this ___ day of _____, 2016.