

For the Nuclear Regulatory Commission.

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of Nuclear Material Safety and Safeguards.*

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## DEPARTMENT OF THE TREASURY

### Office of the Comptroller of the Currency

#### 12 CFR Part 22

[Docket ID OCC-2020-0033]

### FEDERAL RESERVE SYSTEM

#### 12 CFR Part 208

[Docket No. R-1742]

RIN 7100-AG12

### FEDERAL DEPOSIT INSURANCE CORPORATION

#### 12 CFR Part 339

RIN 3064-ZA16

### FARM CREDIT ADMINISTRATION

#### 12 CFR Part 614

### NATIONAL CREDIT UNION ADMINISTRATION

#### 12 CFR Part 760

RIN 3133-AF31

### Loans in Areas Having Special Flood Hazards; Interagency Questions and Answers Regarding Private Flood Insurance

**AGENCY:** Office of the Comptroller of the Currency (OCC); Board of Governors of the Federal Reserve System (Board); Federal Deposit Insurance Corporation (FDIC); Farm Credit Administration (FCA); and National Credit Union Administration (NCUA).

**ACTION:** Notice and request for comment.

**SUMMARY:** The OCC, Board, FDIC, FCA, and NCUA (collectively, the Agencies) propose to supplement the Interagency Questions and Answers Regarding Flood Insurance with new questions and answers regarding the acceptance of flood insurance policies issued by private insurers pursuant to the Agencies' private flood insurance final rule issued in February 2019. These questions and answers will assist lenders in meeting their responsibilities under the final rule and increase public understanding of the Agencies'

respective flood insurance regulations. The Agencies solicit comment on all aspects of these new questions and answers.

**DATES:** Comments on the proposed questions and answers must be submitted on or before May 17, 2021.

**ADDRESSES:** Interested parties are invited to submit written comments to:

*OCC:* Commenters are encouraged to submit comments through the Federal eRulemaking Portal. Please use the title "Loans in Areas Having Special Flood Hazards; Interagency Questions and Answers Regarding 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 <https://regulations.gov/>. Enter "Docket ID OCC-2020-0033" in the Search Box and click "Search." Public comments can be submitted via the "Comment" box below the displayed document information or by clicking on the document title and then clicking the "Comment" box on the top-left side of the screen. For help with submitting effective comments please click on "Commenter's Checklist." For assistance with the *Regulations.gov* site, please call (877) 378-5457 (toll free) or (703) 454-9859 Monday-Friday, 9 a.m.-5 p.m. ET or email [regulations@erulemakinghelpdesk.com](mailto:regulations@erulemakinghelpdesk.com).

- *Mail:* Chief Counsel's Office, Attention: Comment Processing, Office of the Comptroller of the Currency, 400 7th Street SW, Suite 3E-218, Washington, DC 20219.

- *Hand Delivery/Courier:* 400 7th Street SW, Suite 3E-218, Washington, DC 20219.

*Instructions:* You must include "OCC" as the agency name and "Docket ID OCC-2020-0033" in your comment. In general, the OCC will enter all comments received into the docket and publish the comments on the *Regulations.gov* website without change, including any business or personal information provided such as name and address information, email 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 action by the following method:

- *Viewing Comments Electronically—Regulations.gov:* Go to <https://regulations.gov/>. Enter "Docket ID OCC-2020-0033" in the Search Box and click "Search." Click on the "Documents" tab and then the document's title. After clicking the document's title, click the "Browse Comments" tab. Comments can be viewed and filtered by clicking on the "Sort By" drop-down on the right side of the screen or the "Refine Results" options on the left side of the screen. Supporting materials can be viewed by clicking on the "Documents" tab and filtered by clicking on the "Sort By" drop-down on the right side of the screen or the "Refine Documents Results" options on the left side of the screen. For assistance with the *Regulations.gov* site, please call (877) 378-5457 (toll free) or (703) 454-9859 Monday-Friday, 9 a.m.-5 p.m. ET or email [regulations@erulemakinghelpdesk.com](mailto:regulations@erulemakinghelpdesk.com).

The docket may be viewed after the close of the comment period in the same manner as during the comment period.

*Board:* You may submit comments, identified by Docket No. R-1742, 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>.

- *Email:* [regs.comments@federalreserve.gov](mailto:regs.comments@federalreserve.gov). Include the docket number in the subject line of the message.

- *Fax:* (202) 452-3819 or (202) 452-3102.

- *Mail:* Ann E. Misback, 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, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper form in Room 146, 1709 New York Avenue NW, Washington, DC 20006 between 9 a.m. and 5 p.m. on weekdays.

*FDIC:* You may submit comments, identified by RIN 3064-ZA16, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Agency Website:* <https://www.fdic.gov/regulations/laws/federal/>. Follow the instructions for submitting comments.

• *Email: comments@fdic.gov.* Include RIN 3064–ZA16 in the subject line of the message.

• *Mail:* James P. Sheesley, Assistant Executive Secretary, Attention: Comments-RIN 3064–ZA16/Legal ESS, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.

• *Hand Delivery/Courier:* Comments may be hand-delivered to the guard station at the rear of the 550 17th Street NW building (located on F Street) on business days between 7:00 a.m. and 5:00 p.m.

*Instructions:* All submissions must include the agency name and RIN 3064–ZA16 for this rulemaking. Comments received will be posted without change to <https://www.fdic.gov/regulations/laws/federal/>, 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 email 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 comment multiple times via different methods. You may submit comments by any of the following methods:

• *Email:* Send us an email at [reg-comm@fca.gov](mailto:reg-comm@fca.gov).

• *FCA Website:* <http://www.fca.gov>. Click inside the "I want to . . ." field near the top of the page; select "comment on a pending regulation" from the dropdown menu; and click "Go." This takes you to an electronic public comment form.

• *Mail:* Kevin J. Kramp, 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 on our website at <http://www.fca.gov>. Once you are in the website, click inside the "I want to . . ." field near the top of the page; select "find comments on a pending regulation" from the dropdown menu; and click "Go." This will take you to the Comment Letters page where you can select the regulation for which you would like to read the 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 email addresses to help reduce internet spam. You may also review comments at our office in McLean, Virginia. Please call us at (703) 883–4056 or email us at [reg-comm@fca.gov](mailto:reg-comm@fca.gov) to make an appointment.

*NCUA:* You may submit comments identified by RIN 3133–AF31 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.

• *Fax:* (703) 518–6319. Use the subject line "[Your name] Comments on 'Interagency Questions & Answers Regarding Private Flood Insurance'" on the transmission cover sheet.

• *Mail:* Address to Melane Conyers-Ausbrooks, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428.

• *Hand Delivery/Courier:* Same as mail address.

*Public Inspection:* You can view all public comments on the agency's website at <http://www.ncua.gov/Legal/Regs/Pages/PropRegs.aspx> as submitted, except for those we cannot post for technical reasons. The NCUA will not edit or remove any identifying or contact information from the public comments. Due to social distancing measures in effect, the usual opportunity to inspect paper copies of comments in the NCUA's law library is not currently available. After social distancing measures are relaxed, visitors may make an appointment to review paper copies by calling (703) 518–6540 or emailing [OGCMail@ncua.gov](mailto:OGCMail@ncua.gov).

**FOR FURTHER INFORMATION CONTACT:**

*OCC:* Rhonda L. Daniels, Compliance Specialist, Compliance Risk Policy Division, (202) 649–5405; Heidi M. Thomas, Special Counsel, or Cyndy MacMahon, Attorney, Chief Counsel's Office, (202) 649–6350.

*Board:* Lanette Meister, Senior Supervisory Consumer Financial Services Analyst, (202) 452–2705 or Vivian W. Wong, Senior Counsel, (202) 452–3667, Division of Consumer and Community Affairs; Daniel Ericson, Senior Counsel, (202) 452–3359, Legal Division; for users of Telecommunications Device for the Deaf (TDD) only, contact (202) 263–4869.

*FDIC:* Navid Choudhury, Counsel, Policy Unit, Legal Division, (202) 898–6526; or Simin Ho, Senior Policy Analyst, Division of Depositor and Consumer Protection, (202) 898–6907.

*FCA:* Ira D. Marshall, Senior Policy Analyst, Office of Regulatory Policy, (703) 883–4379, TTY (703) 883–4056 or Jennifer Cohn, Senior Counsel, Office of General Counsel, (720) 213–0440.

*NCUA:* Sarah Chung, Senior Staff Attorney, Office of General Counsel, (703) 518–6540, or Lou Pham, Senior Credit Specialist, Office of Examination and Insurance, (703) 518–6360.

**SUPPLEMENTARY INFORMATION:**

**Background**

The National Flood Insurance Act of 1968 created the National Flood Insurance Program (NFIP), which is administered by the Federal Emergency Management Agency (FEMA).<sup>1</sup> The NFIP enables property owners in participating communities to purchase flood insurance if the community has adopted floodplain management ordinances and minimum standards for new and substantially damaged or improved construction. Thus, in participating communities, Federally-backed flood insurance is available for property owners in flood risk areas.

Congress expanded the NFIP by enacting the Flood Disaster Protection Act of 1973 (FDPA).<sup>2</sup> The FDPA made the purchase of flood insurance mandatory in connection with loans made by Federally-regulated lending institutions when the loans are secured by improved real estate or mobile homes located in a special flood hazard area (SFHA). The National Flood Insurance Reform Act of 1994 (the Reform Act) (Title V of the Riegle Community Development and Regulatory Improvement Act of 1994) comprehensively revised the Federal flood insurance statutes.<sup>3</sup> The Reform Act required the OCC, Board, FDIC, Office of Thrift Supervision (OTS), and NCUA to revise their flood insurance regulations, and required the FCA to promulgate a flood insurance regulation for the first time. The OCC, Board, FDIC, OTS, FCA, and NCUA<sup>4</sup> fulfilled these requirements by issuing a joint final rule in the summer of 1996.<sup>5</sup>

Since 1997, the Interagency Questions and Answers<sup>6</sup> have provided the

<sup>1</sup> Public Law 90–448, 82 Stat. 572 (1968).

<sup>2</sup> Public Law 93–234, 87 Stat. 975 (1973).

<sup>3</sup> Title V of Public Law 103–325, 108 Stat. 2255 (1994).

<sup>4</sup> Throughout this document "the Agencies" includes the OTS with respect to events that occurred prior to July 21, 2011, but does not include OTS with respect to events thereafter. Sections 311 and 312 of the Dodd-Frank Wall Street Reform and Consumer Protection Act transferred OTS's functions to other agencies on July 21, 2011. The OTS's supervisory functions relating to Federal savings associations were transferred to the OCC, while those relating to State savings associations were transferred to the FDIC. See also 76 FR 39246 (July 6, 2011).

<sup>5</sup> 61 FR 45684 (Aug. 29, 1996).

<sup>6</sup> Throughout this document, "Questions and Answers" refers to the Interagency Questions and Answers Regarding Flood Insurance in its entirety;

lending industry with guidance addressing a wide spectrum of technical flood insurance-related compliance issues. In 2009, the Agencies comprehensively revised and reorganized the initial 1997 Interagency Questions and Answers. In 2011, the Agencies further finalized two additional Q&As that were proposed in 2009.<sup>7</sup> In October 2013, the Agencies jointly issued proposed rules<sup>8</sup> to implement the escrow, force placement, and private flood insurance provisions of the Biggert-Waters Flood Insurance Reform Act of 2012 (the Biggert-Waters Act).<sup>9</sup> In March 2014, the Homeowner Flood Insurance Affordability Act (HFIAA) was enacted, which, among other things, amended the Biggert-Waters Act's requirements regarding the escrow of flood insurance premiums and fees and created a new exemption from the mandatory flood insurance purchase requirement for certain detached structures.<sup>10</sup> The Agencies finalized the regulations to implement provisions in the Biggert-Waters Act and HFIAA under the Agencies' jurisdiction, except for the provisions related to private flood insurance, with a final rule issued in July 2015.<sup>11</sup> In February 2019, the Agencies finalized regulations that implement the private flood insurance related provisions of the Biggert-Waters Act.<sup>12</sup> This rule requires lenders to accept "private flood insurance," as defined in the Biggert-Waters Act (mandatory acceptance). In order to assist lenders in evaluating whether a flood insurance policy meets the definition of "private flood insurance," the private flood insurance rule also includes a compliance aid provision. Under the compliance aid provision, a lender may conclude that a policy meets the definition of "private flood insurance," without further review, if the policy, or an endorsement to the policy, contains the compliance aid clause set forth in the rule. Moreover, the private flood insurance rule permits a lender, at its discretion, to accept a flood insurance policy issued by a private insurer, even if the policy does not meet the statutory and regulatory

definition of "private flood insurance," provided the policy meets certain requirements in the rule (discretionary acceptance). A lender also is permitted, at its discretion, to accept certain mutual aid plans that meet the conditions stated in the rule.

On June 18, 2019, prior to the effective date of the final rule, the Agencies hosted a webinar entitled "Interagency Flood Insurance Updates on Private Insurance Rule" to discuss updates to the Agencies' flood regulations concerning acceptance of private flood insurance policies.<sup>13</sup> The Agencies also discussed the private flood insurance rule at various flood insurance conferences. Through these activities, the Agencies received numerous questions regarding technical compliance with this rule.

On July 6, 2020, the Agencies issued proposed new and revised Interagency Questions and Answers (July 2020 Proposed Questions and Answers) that covered a broad range of topics related to technical flood insurance-related issues, including the escrow of flood insurance premiums, the detached structure exemption to the mandatory purchase of flood insurance requirement, and force-placement procedures.<sup>14</sup> The July 2020 Proposed Questions and Answers included only two Q&As related to private flood insurance because the private flood insurance rule had only been in effect since July 2019.

As noted in the July 2020 Proposed Questions and Answers, the Agencies committed to separately issuing for notice and comment proposed questions and answers relating to the private flood insurance rule. Accordingly, the Agencies have carefully considered each of the many questions received on the private flood insurance rule since its issuance, categorized and consolidated the questions, and drafted 24 private flood insurance questions and answers to be broadly applicable to supervised lenders and servicers. The Agencies are now issuing for public comment these 24 proposed questions and answers, categorized in the three following sections:

- I. Private Flood Insurance—Mandatory Acceptance
- II. Private Flood Insurance—Discretionary Acceptance
- III. Private Flood Insurance—General Compliance

<sup>13</sup> For more information about the June 2019 interagency webinar on the private flood insurance rule, including the presentation transcripts, see <https://www.consumercomplianceoutlook.org/outlook-live/2019/interagency-flood-insurance-regulation-update/>.

<sup>14</sup> See 85 FR 40442 (July 6, 2020).

To assist the reader, the Agencies have included references to specific Q&As from the July 2020 Proposed Questions and Answers and from other Q&As in this proposal when helpful. In addition, the following terms are used throughout this document: "Act" refers to the National Flood Insurance Act of 1968 and the Flood Disaster Protection Act of 1973, as revised by the National Flood Insurance Reform Act of 1994, Biggert-Waters Flood Insurance Reform Act of 2012 and Homeowner Flood Insurance Affordability Act (codified at 42 U.S.C. 4001 *et seq.*). "Regulation" refers to each Agency's current rule.<sup>15</sup> Furthermore, the Agencies note that some of the information included in certain proposed questions and answers is derived from the preamble of the private flood insurance final rule.

The Agencies plan to publish a final document in the **Federal Register** that consolidates these proposed private flood insurance questions and answers and the July 2020 Proposed Questions and Answers into one set of Interagency Questions and Answers Regarding Flood Insurance.

### Public Comments

The Agencies solicit comment on all aspects of the proposed questions and answers regarding the private flood insurance rule. If lenders, community groups, or other parties have unanswered questions or comments about the private flood insurance provision of the Regulation, they are invited to submit them to the Agencies in their comments.

### Section-by-Section Analysis

#### I. Private Flood Insurance—Mandatory Acceptance

The Agencies propose nine new Q&As to address issues regarding the mandatory acceptance and the application of the compliance aid assurance clause with respect to the private flood insurance provision of the Regulation. The new proposed Q&As would be designated as Mandatory 1–9. Proposed new Q&A Mandatory 1 would address whether a lender may decide to only accept private flood insurance policies under the mandatory acceptance provision of the Regulation. The proposed answer would confirm that a lender may decide to only accept flood insurance policies issued by a private insurer that the lender is required to accept because the policies meet the definition of "private flood

<sup>15</sup> The Agencies' rules are codified at 12 CFR part 22 (OCC), 12 CFR part 208 (Board), 12 CFR part 339 (FDIC), 12 CFR part 614 (FCA), and 12 CFR part 760 (NCUA).

"Q&A" refers to an individual question and answer within the Questions and Answers.

<sup>7</sup> For additional information on the history of Interagency Questions and Answers, please see the preamble to the July 2020 Proposed Interagency Questions and Answers at 85 FR 40442 (July 6, 2020).

<sup>8</sup> 78 FR 65108 (Oct. 30, 2013).

<sup>9</sup> Public Law 112–141, 126 Stat. 916 (2012).

<sup>10</sup> Public Law 113–89, 128 Stat. 1020 (2014).

<sup>11</sup> 80 FR 43216 (July 21, 2015). Subsequently, on November 7, 2016, the Agencies re-proposed the private flood insurance provisions through a joint notice of proposed rulemaking (81 FR 78063).

<sup>12</sup> 84 FR 4953 (Feb. 20, 2019).

insurance” under the Regulation. The proposed answer also would clarify that a lender is not required to accept flood insurance policies that only meet the criteria set forth in the discretionary acceptance or mutual aid provisions in the Regulation.

Proposed new Q&A Mandatory 2 would address when a lender must review a flood policy issued by a private flood insurer to make sure the policy meets the mandatory acceptance criteria, other than at loan origination. The proposed response would explain that, other than at origination, a lender must review a flood insurance policy issued by a private insurer when the policy is up for renewal, or any time the borrower presents the lender with any new flood insurance policy issued by a private insurer. The Agencies would clarify that a lender must review the policy in these instances in addition to when a triggering event occurs (making, increasing, extending or renewing a loan).

During this review, a lender may determine that the policy meets the mandatory acceptance criteria without further review if the policy or an endorsement to the policy includes the compliance aid assurance clause. However, if the policy does not meet the mandatory acceptance criteria, the lender may still accept it if it meets the discretionary acceptance criteria or, if applicable, the mutual aid plan criteria. The proposed answer would also explain that if the policy does not meet any such criteria, the lender must notify the borrower in accordance with the force placement provisions of the Regulation. If the borrower does not purchase flood insurance that complies with the Regulation, the lender must purchase insurance on the borrower’s behalf. In addition, the Agencies would clarify that a lender may rely on a previous review of a flood insurance policy under the discretionary acceptance provision, provided there are no changes to the terms of the policy. However, as required by the Regulation and discussed below in proposed new Q&A Discretionary 4, the lender must document its conclusion regarding sufficient protection of the loan in writing. The Agencies are also including a reference to proposed new Q&A Discretionary 4.

Proposed new Q&A Mandatory 3 would address whether the private flood insurance requirements under the Regulation require a lender to change its policy of not originating a mortgage in non-participating communities or coastal barrier regions where the NFIP is not available. The proposed answer would explain that the Regulation does

not require a lender to originate a loan that does not meet the lender’s underwriting criteria. The Agencies would note that the flood insurance purchase requirement only applies to loans secured by structures located or to be located in an SFHA in which flood insurance is available under the Act. As stated in proposed Q&A Applicability 1 in the July 2020 Proposed Questions and Answers, the flood insurance purchase requirement does not apply within non-participating communities where NFIP insurance is not available under the Act. Therefore, the proposed answer would state that the lender does not need to change its policy of not originating mortgages in areas where NFIP insurance is unavailable solely because of the private flood insurance requirements under the Regulation.

Proposed new Q&A Mandatory 4 would address whether the compliance aid assurance clause could act as a conformity clause that would make a private policy conform to the definition of private flood insurance under the Regulation. The Agencies propose to clarify that the compliance aid assurance clause is not intended to act as a conformity clause but rather to facilitate the ability of lenders and consumers to recognize policies that meet the definition of “private flood insurance” and to promote the consistent acceptance of policies that meet this definition.

Proposed new Q&A Mandatory 5 would provide that a lender is not required to accept a flood insurance policy issued by a private insurer solely because the policy contains the compliance aid assurance clause if the lender chooses to conduct its own review and determines the flood insurance policy actually does not meet the mandatory acceptance requirements. The proposed answer also would note that if a flood insurance policy issued by a private insurer does not include the compliance aid assurance clause, the lender must still review the policy to determine if it meets the requirements for private flood insurance as set forth in the Regulation before the lender may choose to reject the policy.

Proposed new Q&A Mandatory 6 would discuss whether a lender is required to conduct an additional review of a flood insurance policy under the mandatory acceptance provision if the policy includes the compliance aid assurance clause. The proposed answer would state that under the mandatory acceptance provision of the Regulation, if a policy or an endorsement to the policy contains the compliance aid assurance clause, a lender is *not* required to conduct any further review

of the policy in order to determine that the policy meets the definition of “private flood insurance.” The Agencies also propose to clarify that the language of the compliance aid assurance clause must be stated as set forth in the Regulation in order for the lender to rely on the protections of the compliance aid assurance clause. However, the proposed answer would provide that a lender need not reject a policy containing the compliance aid assurance clause if the formatting, font, punctuation, and similar stylistic effects that do not change the substantive meaning of the clause are different from the compliance aid assurance clause set forth in the Regulation. The proposed answer would also include a reference to proposed new Q&A Mandatory 7.

Proposed new Q&A Mandatory 7 would describe additional reviews a lender must conduct when a flood insurance policy issued by a private insurer includes the compliance aid assurance clause, as the clause only assists a lender in making the determination that a flood insurance policy meets the definition of private flood insurance in the Regulation, and not other requirements specified in the Regulation. Specifically, the lender also must ensure that the coverage is at least equal to 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 Act, and also should ensure that other key aspects of the policy are accurate, such as the borrower’s name and property address. The proposed answer would also include a reference to proposed new Q&A Mandatory 6.

Proposed new Q&A Mandatory 8 would address whether a lender may use the criteria under the discretionary acceptance provision to decide whether to accept a policy that does not contain the compliance aid assurance clause without first reviewing the policy to determine if it meets the mandatory acceptance provision. The proposed answer would clarify that a lender may first review the policy to determine whether it meets the criteria under the discretionary acceptance provision. However, if the policy is not accepted under the discretionary acceptance provision, the lender would still need to determine whether it *must* accept the policy under the mandatory acceptance criteria. The proposed answer would also remind lenders to document that a policy provides sufficient protection of the loan if the lender accepts the policy under the discretionary acceptance provision of the Regulation.

Lastly, new proposed Q&A Mandatory 9 would note that if the compliance aid assurance clause is included on the declarations page, a lender may accept the policy without further review to determine whether the policy meets the definition of private flood insurance. However, a lender must also ensure compliance with the mandatory purchase requirement.

## II. Private Flood Insurance—Discretionary Acceptance

The Agencies propose to add four new Q&As to provide additional clarity on the discretionary acceptance provision of the Regulation. These new Q&As would be designated as Discretionary 1–4. Proposed new Q&A Discretionary 1 would address whether lenders are required to accept flood insurance policies that meet the discretionary acceptance criteria. The proposed answer would note that the discretionary acceptance criteria in the Regulation set forth the minimum acceptable criteria that a flood insurance policy must have for the lender to accept the policy under the discretionary acceptance provision. The proposed answer would clarify that it is at the lender's discretion to accept a policy that meets the discretionary acceptance criteria so long as the policy does not meet the mandatory acceptance criteria.

Proposed new Q&A Discretionary 2 would address the requirements for documentation to demonstrate that a policy provides sufficient protection of a loan when a lender accepts that policy under the discretionary acceptance criteria. The proposed answer would explain that the Regulation requires the lender to document its conclusion in writing that the policy provides sufficient protection of the loan, consistent with safety and soundness principles. In addition, the proposed answer would include a reference to proposed Q&A Coverage 1 from the July 2020 Proposed Questions and Answers, which discusses some factors to consider when determining whether a flood insurance policy issued by a private insurer provides sufficient protection of the loan, consistent with safety and soundness principles.<sup>16</sup>

<sup>16</sup> These factors include whether: (1) A policy's deductibles are reasonable based on a borrower's financial condition; (2) the insurer provides adequate notice of cancellation to the mortgagor and the mortgagee; (3) the terms and conditions of the policy with respect to payment per occurrence or per loss and aggregate limits are adequate to protect the lending institution's interest in the collateral; (4) the flood insurance policy complies with applicable State insurance laws; and (5) the private insurance company has the financial

Furthermore, the proposed answer would note that while the Regulation does not require any specific documentation to demonstrate that the policy provides sufficient protection of the loan, lenders may include any information that reasonably supports the lender's conclusion following review of the policy.

Proposed new Q&A Discretionary 3 would address how a lender could evaluate concerns related to an insurer's solvency, strength, and ability to pay claims in order to determine whether an insurance policy provides sufficient protection of a loan, consistent with general safety and soundness principles. The proposed answer would provide that a lender may evaluate an insurer's solvency, strength, and ability to satisfy claims by obtaining information from the State insurance regulator's office of the State in which the property securing the loan is located, among other options. The proposed answer would further indicate that a lender could rely on the licensing or other processes used by the State insurance regulator for such an evaluation. The proposed answer would also include a reference to proposed Q&A Coverage 1 from the July 2020 Proposed Questions and Answers.

Proposed new Q&A Discretionary 4 would address whether a lender is required to review a flood insurance policy upon renewal if that policy was issued by a private insurer and was originally accepted in accordance with the discretionary acceptance requirements. The proposed answer would provide that if a lender had accepted a flood insurance policy issued by a private insurer in accordance with the discretionary acceptance requirements and the policy is renewed, the lender would be required to review the policy upon renewal to ensure that it continues to meet the discretionary acceptance requirements. The proposed answer would also state that a lender would need to document its conclusion regarding sufficiency of the protection of the loan in writing upon each renewal to indicate that the policy continues to provide sufficient protection of the loan.

## III. Private Flood Insurance—General Compliance

The Agencies propose to add 11 new Q&As on topics related to the private flood insurance provisions of the Regulation that are not covered in sections I and II above. The new proposed Q&As would be designated as Private Flood Compliance 1–11.

strength, solvency and ability to satisfy claims. See 85 FR 40442, 40458 (July 6, 2020).

New proposed Q&A Private Flood Compliance 1 would address questions on the maximum deductible that a flood insurance policy issued by a private insurer can have for properties located in an SFHA. Under the proposed answer, the Agencies would clarify that the analysis would depend on whether the lender is accepting the flood insurance policy under the mandatory acceptance provision or the discretionary acceptance provision.

Specifically, for a private flood insurance policy that the lender is accepting under the mandatory acceptance provision, the proposed answer would state that the Regulation provides that the policy must contain a deductible that is "at least as broad as" the maximum deductible in the Standard Flood Insurance Policy (SFIP) under the NFIP, which means that the deductible is no higher than the specified maximum under an SFIP for any total coverage amount up to the maximum available under the NFIP at the time the policy is provided to the lender. The proposed answer would provide that a policy with a coverage amount exceeding that available under the NFIP may have a deductible exceeding the specific maximum deductible under an SFIP. However, the proposed answer would also advise that for safety and soundness purposes, the lender should consider whether the deductible is reasonable based on the borrower's financial condition, consistent with guidance the Agencies proposed in Q&A Amount 9<sup>17</sup> in the July 2020 Proposed Questions and Answers and with how deductibles may be evaluated under the discretionary acceptance provision. The proposed answer would also set forth examples to aid in compliance.

The Agencies note that this proposed guidance regarding the deductible for a private flood insurance policy with a coverage amount exceeding that available under the NFIP is different from the informal advice the Agencies previously provided in supplementary information to the private flood insurance rule.<sup>18</sup> In the supplementary information to the private flood insurance rule, the Agencies advised that even for private flood insurance

<sup>17</sup> Proposed Q&A Amount 9, adapted from current Q&A 17, provides that a lender should determine the reasonableness of the deductible on a case-by-case basis, taking into account the risk that such a deductible would pose to the borrower and the lender. Proposed Q&A Amount 9 also states that a lender may not allow the borrower to use a deductible amount equal to the insurable value of the property to avoid the mandatory purchase requirement for flood insurance. See 85 FR 40442 at 40463 (July 6, 2020).

<sup>18</sup> See 84 FR 4953 at 4957 (Feb. 20, 2019).

policies with amounts exceeding the maximum coverage under the NFIP, the lender should still match the SFIP deductible for the amount up to the maximum coverage amount under the NFIP but could exceed the maximum deductible for an SFIP for the coverage over the maximum coverage amount available under the NFIP. However, based on additional investigation, the Agencies understand that these types of tiered deductibles are not common and the guidance provided in the supplementary information may not be practicable. Therefore, the Agencies believe the guidance they are proposing in Q&A Private Flood Compliance 1 with respect to deductibles for private flood insurance policies accepted under the mandatory acceptance provision will be more consistent with private flood insurance policies available in the marketplace and safety and soundness standards.

Proposed Q&A Private Flood Compliance 1 would also provide guidance for accepting flood insurance policies issued by private insurers under the discretionary acceptance provision. Under the Regulation, the policy must provide sufficient protection of the loan, consistent with general safety and soundness principles. Proposed Q&A Private Flood Compliance 1 would note that among the factors a lender could consider in determining whether a policy provides sufficient protection of a loan is whether the policy's deductible is reasonable based on the borrower's financial condition. Therefore, unlike the limitation on deductibles for policies accepted under the mandatory acceptance provision for any total coverage amount up to the maximum available under the NFIP, the proposed answer would provide that a lender can accept a flood insurance policy issued by a private insurer under the discretionary acceptance provision with a deductible higher than that for an SFIP for a similar type of property, provided the lender has determined the policy provides sufficient protection of the loan, consistent with general safety and soundness principles.

Proposed Q&A Private Flood Compliance 1 would also include a reminder that, consistent with the guidance provided in proposed Q&A Amount 9 in the July 2020 Proposed Questions and Answers, a lender may not allow the borrower to use a deductible amount equal to the insurable value of the property to avoid the mandatory purchase requirement for flood insurance. This principle would apply whether the lender is evaluating the policy under the mandatory

acceptance provision or the discretionary acceptance provision.

The Agencies also received questions on whether a lender may require that the deductible of any flood insurance policy issued by a private insurer be lower than the maximum deductible for an NFIP policy. New proposed Q&A Private Flood Compliance 2 would clarify that a lender may do so under both the mandatory acceptance provision and the discretionary acceptance provision. For the mandatory acceptance provision, the Regulation requires that the private flood insurance policy be at least as broad as an NFIP policy, which includes a requirement that the private flood insurance policy contain a deductible *no higher* than the specified maximum deductible for an SFIP. Therefore, the proposed answer would clarify that a lender may require a borrower's private flood insurance policy deductible be lower than the maximum deductible for an NFIP policy in connection with a policy that the lender accepts under the mandatory acceptance provision consistent with general safety and soundness principles and based on a borrower's financial condition, among other factors. With respect to the discretionary acceptance provision, the proposed answer would note that the lender need only consider whether the policy, including the stated deductible, provides sufficient protection of the loan, consistent with general safety and soundness principles. The proposed answer would also include a reference to proposed Q&A Private Flood Compliance 1.

Proposed new Q&A Private Flood Compliance 3 would provide guidance regarding whether a lender may charge fees to the borrower for the lender's use of a third party to review flood insurance policies. The proposed answer would provide that the Act and the Regulation do not prohibit lenders from charging fees to borrowers for contracting with a third party to review flood insurance policies, with references to Q&A Fees 1 and Q&A Fees 2 proposed in the July 2020 Proposed Questions and Answers.<sup>19</sup> The proposed answer would remind lenders that they should be aware of any other applicable

<sup>19</sup>Proposed Q&A Fees 1, adapted from current Q&A 69, lists the four instances in the Act and Regulation when a lender or servicer can charge the borrower a fee for making a flood determination. Proposed Q&A Fees 2, adapted from current Q&A 70, provides that charges made for life-of-loan reviews by determination firms may be passed to the borrower under certain conditions. See 85 FR 40442 at 40459–60 (July 6, 2020).

requirements regarding fees and disclosures of fees.

Proposed new Q&A Private Flood Compliance 4 addresses the lender's responsibility to ensure a flood insurance policy issued by a private insurer meets the requirements of the Regulation if the policy is not available prior to loan closing. The proposed answer would provide that the Act and Regulation do not specify the acceptable types of documentation for a lender to rely on when reviewing a flood insurance policy issued by a private insurer. The proposed answer also would advise that lenders should determine whether they have sufficient evidence to show the policy meets the requirements under the Regulation and that if the lender does not have enough information to determine if the policy meets the private flood insurance requirements under the Regulation, then the lender should timely request additional information as necessary to complete its review. The proposed answer also would suggest some optional steps that a lender could take to mitigate against closing delays.

The Agencies received many questions requesting guidance on whether a declarations page provides sufficient information for a lender to determine whether the policy complies with the Regulation. Proposed new Q&A Private Flood Compliance 5 would note that the answer depends on the information contained in the declarations page. Under the proposed answer, if the declarations page provides sufficient information for the lender to determine whether the policy meets the mandatory acceptance provision or the discretionary acceptance provision of the Regulation or if the declarations pages contains the compliance aid assurance clause, then the lender may rely on the declarations page. However, if the declarations page does not provide sufficient information for the lender to determine whether the policy satisfies the mandatory acceptance or the discretionary acceptance provision of the Regulation, the proposed answer would suggest that the lender should request additional information about the policy to aid its determination.

Proposed new Q&A Private Flood Compliance 6 would provide guidance on a lender's ability to accept multiple-peril policies. Specifically, the proposed answer would clarify that a lender may accept multiple-peril policies that cover the hazard of flood under the private flood insurance provisions of the Regulation, provided they meet the requirements of the Regulation.

Proposed new Q&A Private Flood Compliance 7 would address the question of how the private flood insurance requirements of the Regulation would work in conjunction with requirements of secondary market investors, such as the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac). The proposed answer would first remind lenders that they must comply with the Federal flood insurance requirements. The proposed answer would then note that secondary market investor requirements are separate from the requirements of the Regulation. Therefore, if a lender plans to sell loans to such an investor, the proposed answer would advise that a lender should carefully review the investor's requirements and direct questions regarding these requirements to the appropriate entities.

The Agencies are proposing new Q&A Private Flood Compliance 8 to provide guidance to servicers for loans covered by flood insurance mandated by the Act. Specifically, the proposed answer would clarify that for loans serviced on behalf of lenders supervised by the Agencies, the servicer must comply with the Regulation in determining whether a flood insurance policy issued by a private insurer must be accepted under the mandatory acceptance provision or may be accepted under the discretionary acceptance or mutual aid provisions. However, for loans serviced on behalf of other entities not supervised by the Agencies, the proposed answer would state that the servicer should comply with the terms of its contract with such an entity. The proposed answer would suggest that when servicing loans on behalf of Fannie Mae or Freddie Mac, where there are insurer rating requirements specified within those entities' servicing guidance or other relevant authorities that are not included in the Regulation, the servicer should adhere to those servicing requirements.

The Agencies also propose to add three new Q&As to provide guidance regarding optional methods lenders can use to address questions on whether an insurer is licensed, admitted, or otherwise approved to do business in a particular State, which is one of the factors lenders must evaluate under both the mandatory acceptance and discretionary acceptance provisions. Proposed new Q&A Private Flood Compliance 9 would explain how a lender could determine whether an insurer is licensed, admitted, or otherwise approved in a particular

State, or whether a surplus lines<sup>20</sup> or nonadmitted alien insurer<sup>21</sup> is permitted to issue an insurance policy in a particular State. The proposed answer would suggest that a lender may review the website of the State insurance regulator where the collateral property is located to determine whether a particular insurer is licensed, admitted, or otherwise permitted to issue insurance in a particular State. The proposed answer also would advise that a lender could contact the State insurance regulator directly. Further, the proposed answer notes that the information with respect to surplus lines insurer eligibility may be available in the Consumer Insurance Search (CIS) tool available on the National Association of Insurance Commissioners (NAIC) website.<sup>22</sup> The proposed answer would state that lenders also may consult commercial service providers regarding the eligibility of surplus lines insurers in particular States as long as the lenders have a reasonable basis to believe that these service providers have reliable information. With regard to nonadmitted alien insurers in particular, the proposed answer would suggest that lenders could review the NAIC's Quarterly Listing of Alien Insurers.<sup>23</sup>

Proposed new Q&A Private Flood Compliance 10 would address whether lenders may accept policies issued by private insurers that are surplus lines insurers for noncommercial residential properties. The proposed answer would explain that if the surplus lines insurer is eligible or not disapproved to place insurance in the State or jurisdiction in which the property to be insured is located, lenders may accept policies issued by surplus lines insurers as coverage for noncommercial (*i.e.*,

residential) properties. In addition, consistent with the Act and the Regulation, the proposed answer would confirm that policies issued by surplus lines insurers for noncommercial properties are covered in the definition of "private flood insurance" and in the discretionary acceptance provision.<sup>24</sup> In the definition of "private flood insurance," surplus lines policies for noncommercial properties are covered as policies that are issued by insurance companies that are "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." The proposed answer also would note that within the discretionary acceptance provision, noncommercial residential policies issued by surplus lines carriers are covered as policies that are issued by private insurance companies that are "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."

As noted above, if the surplus lines insurer is eligible or not disapproved to place insurance in the State or jurisdiction in which a property to be insured is located, the surplus lines insurer is deemed to be "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" for purposes of the Act and Regulation. Therefore, the proposed answer would note that even if the surplus lines insurer is not considered to be engaged in the business of insurance under applicable State law, the surplus lines insurer nevertheless would meet the criteria *only* for purposes of this provision of the Regulation if the insurer is eligible or not disapproved to place insurance in the State or jurisdiction in which a property to be insured is located.

For example, under section 1776 of the California Insurance Code, the

<sup>20</sup> The National Association of Insurance Commissioners (NAIC) notes, "[t]he surplus lines market (inclusive of U.S. and non-U.S. domiciled insurers) is a distinct segment of the industry consisting of non-admitted specialized insurers covering risks not available within the admitted market . . . Surplus lines insurers are subject to regulatory requirements and are overseen for solvency by their domiciliary [S]tate or country." [https://content.naic.org/cipr\\_topics/topic\\_surplus\\_lines.htm](https://content.naic.org/cipr_topics/topic_surplus_lines.htm). For specific definitions related to surplus lines insurers, lenders should review the State law in which the property is located.

<sup>21</sup> The NAIC notes that "[w]hereas [S]tates monitor the eligibility of U.S. domiciled surplus lines insurers, alien insurers eligible to write surplus lines premium are listed on the NAIC Quarterly Listing of Alien Insurers [[https://www.naic.org/prod\\_serv\\_alpha\\_listing.htm#quarterly\\_alien](https://www.naic.org/prod_serv_alpha_listing.htm#quarterly_alien)] . . . [Alien insurers] are prohibited from establishing a U.S. branch office." [https://content.naic.org/cipr\\_topics/topic\\_surplus\\_lines.htm](https://content.naic.org/cipr_topics/topic_surplus_lines.htm).

<sup>22</sup> See [https://content.naic.org/cis\\_consumer\\_information.htm](https://content.naic.org/cis_consumer_information.htm).

<sup>23</sup> See [https://www.naic.org/prod\\_serv\\_alpha\\_listing.htm#quarterly\\_alien](https://www.naic.org/prod_serv_alpha_listing.htm#quarterly_alien).

<sup>24</sup> During discussion of the Biggert-Waters Act on the Senate floor, Sen. Crapo noted that surplus lines insurers can provide flood insurance coverage for residential properties and asked for clarification regarding the inclusion of surplus lines coverage in the definition of "private flood insurance." In his response, Sen. Johnson stated, "[T]he definition of 'private flood insurance' includes private flood insurance provided by a surplus lines insurer and is not intended to limit surplus lines eligibility to nonresidential properties. While the Senator is correct that surplus lines insurance is specifically mentioned in that context, overall the definition accommodates private flood insurance from insurers who are 'licensed, admitted, or otherwise approved' in the State where the property is located." 158 Cong. Rec. S6051 (daily ed. Sept. 10, 2012).

permission granted to allow an insurance policy issued by a nonadmitted insurer to be placed in California, “shall not be deemed or construed to authorize any insurer to do business in [California].”<sup>25</sup> In addition, section 1776 of the California Insurance Code states that “[p]lacement activities of a licensed surplus line broker in accordance with [California law], including, but not limited to, policy issuance, shall not be deemed or construed to be business done by the insurer in [California].”<sup>26</sup> However, it is the Agencies’ understanding that these provisions of California law do not make ineligible or disapprove any individual surplus lines insurer from placing insurance in California if they meet all other applicable requirements in California law. Consequently, a surplus lines insurer that is eligible or not disapproved to place insurance in California is “otherwise approved” for purposes of the Regulation even though the surplus lines insurer is not authorized to do business in California for purposes of Section 1776 of the California Insurance Code.

Proposed new Q&A Private Flood Compliance 11 would address whether a lender may accept a private flood insurance policy that includes a compliance aid assurance clause, but also includes a disclaimer that the “insurer is not licensed in the State or jurisdiction in which the property is located.” The proposed answer would explain that there are circumstances under which lenders may accept a policy issued by an insurer that is not licensed in the State or jurisdiction in which the property is located. For example, a lender would be able to accept a policy issued by a surplus lines insurer recognized or not disapproved by the relevant State insurance regulator as protection for loan collateral that is a nonresidential commercial property. The proposed answer would also provide that a lender may accept a policy issued by a surplus lines insurer as protection for loan collateral that includes residential property as a policy issued by an insurance company that is “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.” The proposed answer would include a cross-reference to proposed Q&A Private Flood Compliance 10.

## Interagency Questions and Answers Regarding Private Flood Insurance

### I. Private Flood Insurance—Mandatory Acceptance

**Mandatory 1.** May a lender decide to only accept private flood insurance policies under the mandatory acceptance provision of the Regulation?

Yes. A lender is only required to accept flood insurance policies issued by a private insurer that meet the definition of “private flood insurance” under the Regulation. A lender is not required to accept flood insurance policies that only meet the criteria set forth in the discretionary acceptance or mutual aid provision of the Regulation.

**Mandatory 2.** Apart from loan origination, when must a lender review a flood policy issued by a private flood insurer?

Once a flood insurance policy issued by a private insurer comes up for renewal or any time the borrower presents the lender with any new flood insurance policy issued by a private insurer, regardless of whether a triggering event occurred (making, increasing, extending or renewing a loan), the lender must review the policy to determine whether it meets the mandatory acceptance criteria.<sup>27</sup> A lender may determine that the policy meets the mandatory acceptance criteria without further review if the policy or an endorsement to the policy includes the compliance aid assurance clause.<sup>28</sup> If the policy does not meet the mandatory acceptance criteria, the lender may still accept the policy if it meets the discretionary acceptance criteria or, if applicable, the mutual aid plan criteria. If the policy does not meet the mandatory acceptance, discretionary acceptance, or mutual aid plan criteria, the lender must notify the borrower in accordance with the force placement provisions of the Regulation.<sup>29</sup> If the borrower does not purchase flood insurance that complies with the Regulation, the lender must purchase insurance on the borrower’s behalf.<sup>30</sup>

If the lender has previously reviewed the flood insurance policy under the

discretionary acceptance provision to ensure that the policy meets the private flood insurance requirements of the Regulation, the lender may rely on its previous review, provided there are no changes to the terms of the policy. However, as required by the Regulation, the lender must document its conclusion regarding sufficiency of protection of the loan in writing.<sup>31</sup> See Q&A Discretionary 4.

**Mandatory 3.** If a lender has a policy not to originate a mortgage in non-participating communities or coastal barrier regions where the NFIP is not available, do the private flood insurance requirements under the Regulation require a lender to change its policy?

The Regulation does not require that a lender originate a loan that does not meet the lender’s underwriting criteria. The Agencies note that the flood insurance purchase requirement only applies to loans secured by structures located or to be located in an SFHA in which flood insurance is available under the Act.<sup>32</sup> As noted in Q&A Applicability 1, the flood insurance purchase requirement does not apply within non-participating communities, where NFIP insurance is not available under the Act. Therefore, the lender does not need to change its policy of not originating mortgages in areas where NFIP insurance is unavailable solely because of the private flood insurance requirements under the Regulation.

**Mandatory 4.** Did the Agencies intend the compliance aid assurance clause to act as a conformity clause that would make a private policy conform to the definition of private flood insurance?

No. The Agencies did not intend the compliance aid assurance clause to act as a conformity clause. Rather, the compliance aid assurance clause is intended to facilitate the ability of lenders, as well as consumers, to recognize policies that meet the definition of “private flood insurance” and promote the consistent acceptance of policies that meet this definition. The compliance aid provision is intended to leverage the expertise of insurers to assist lenders in satisfying the requirements of the Regulation.

<sup>27</sup> See 12 CFR 22.3(c)(1) (OCC); 12 CFR 208.25(c)(3)(i) (Board); 12 CFR 339.3(c)(1) (FDIC); 12 CFR 614.4930(c)(1) (FCA); and 12 CFR 760.3(c)(1) (NCUA).

<sup>28</sup> 12 CFR 22.3(c)(2) (OCC); 12 CFR 208.25(c)(3)(ii) (Board); 12 CFR 339.3(c)(2) (FDIC); 12 CFR 614.4930(c)(2) (FCA); and 12 CFR 760.3(c)(2) (NCUA).

<sup>29</sup> 12 CFR 22.7 (OCC); 12 CFR 208.25(g) (Board); 12 CFR 339.7 (FDIC); 12 CFR 614.4945 (FCA); and 12 CFR 760.7 (NCUA).

<sup>30</sup> 12 CFR 22.7(a) (OCC); 12 CFR 208.25(g)(1) (Board); 12 CFR 339.7(a) (FDIC); 12 CFR 614.4945(a) (FCA); and 12 CFR 760.7(a) (NCUA).

<sup>31</sup> 12 CFR 22.3(c)(3) (OCC); 12 CFR 208.25(c)(3)(iii) (Board); 12 CFR 339.3(c)(3) (FDIC); 12 CFR 614.4930(c)(3) (FCA); and 12 CFR 760.3(c)(3) (NCUA).

<sup>32</sup> Public Law 93–234, 87 Stat. 975 (1973).

<sup>25</sup> Cal. Ins. Code § 1776.

<sup>26</sup> *Id.*



Mandatory 5. Is a lender required to accept a flood insurance policy issued by a private insurer that includes the compliance aid assurance clause? Conversely, may a lender reject a flood insurance policy issued by a private insurer solely because it does not contain the compliance aid assurance clause?

A lender is not required to accept a flood insurance policy issued by a private insurer solely because the policy contains the compliance aid assurance clause if the lender chooses to conduct its own review and determines the flood insurance policy actually does not meet the mandatory acceptance requirements.

If a flood insurance policy issued by a private insurer does not include the compliance aid assurance clause, the lender must still review the policy to determine if it meets the requirements for private flood insurance as set forth in the Regulation before the lender may choose to reject the policy.<sup>33</sup>

Mandatory 6. If a flood insurance policy issued by a private insurer includes the compliance aid assurance clause, does a lender need to conduct an additional review of the policy for compliance with the mandatory acceptance provision of the Regulation?

No, under the mandatory acceptance provision of the Regulation, if a policy or an endorsement to the policy contains the compliance aid assurance clause, further review is not necessary in order for the lender to determine that a policy meets the definition of “private flood insurance.”<sup>34</sup>

It is important to note that, in order for the lender to rely on the compliance aid assurance clause without further review of the policy, the language of the compliance aid assurance clause must be stated in the policy, or as an endorsement to the policy, as set forth in the Regulation. If the language is different from the compliance aid assurance clause set forth in the Regulation, the lender cannot rely on the protections of the compliance aid assurance clause in the Regulation and should review the policy to determine if it meets the definition of private flood insurance. However, a policy containing the compliance aid assurance clause need not be rejected if there are stylistic differences, such as formatting, font, and punctuation that do not change the substantive meaning of the clause, from

<sup>33</sup> 12 CFR 22.3(c) (OCC); 12 CFR 208.25(c)(3) (Board); 12 CFR 339.3(c) (FDIC); 12 CFR 614.4930(c) (FCA); and 12 CFR 760.3(c) (NCUA).

<sup>34</sup> 12 CFR 22.3(c)(2) (OCC); 12 CFR 208.25(c)(3)(ii) (Board); 12 CFR 339.3(c)(2) (FDIC); 12 CFR 614.4930(c)(2) (FCA); and 12 CFR 760.3(c)(2) (NCUA).

the compliance aid assurance clause included in the Regulation. *See also* Q&A Mandatory 7.

Mandatory 7. What additional reviews does a lender need to conduct if the flood insurance policy issued by a private insurer includes the compliance aid assurance clause?

Although a lender may rely on the compliance aid assurance clause to determine that a flood insurance policy meets the definition of private flood insurance in the Regulation, the lender must also ensure that the coverage is at least equal to 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 Act.<sup>35</sup> The lender should also ensure that other key aspects of the policy are accurate, such as the borrower’s name and property address. *See also* Q&A Mandatory 6.

Mandatory 8. If a flood insurance policy issued by a private issuer does not include a compliance aid assurance clause, can a lender use the criteria under the discretionary acceptance provision to decide whether to accept the policy without first checking to see if the policy meets the criteria under the mandatory acceptance provision?

Yes, the lender may first review the policy to determine whether it meets the criteria under the discretionary acceptance provision.<sup>36</sup> However, even if the policy does not meet the discretionary acceptance criteria, the lender will still need to determine whether it must accept the policy under the mandatory acceptance criteria.<sup>37</sup>

Note that if the lender accepts a policy under the discretionary acceptance provision, the Regulation requires the lender to document that the policy provides sufficient protection of the loan.<sup>38</sup>

Mandatory 9. If the compliance aid assurance clause is on the declarations page, may a lender accept the policy without further review?

If the compliance aid assurance clause is included on the declarations page, a

<sup>35</sup> 12 CFR 22.3(a) (OCC); 12 CFR 208.25(c)(1) (Board); 12 CFR 339.3(a) (FDIC); 12 CFR 614.4930(a) (FCA); and 12 CFR 760.3(a) (NCUA).

<sup>36</sup> 12 CFR 22.3(c)(3) (OCC); 12 CFR 208.25(c)(3)(iii) (Board); 12 CFR 339.3(c)(3) (FDIC); 12 CFR 614.4930(c)(3) (FCA); and 12 CFR 760.3(c)(3) (NCUA).

<sup>37</sup> 12 CFR 22.3(c) (OCC); 12 CFR 208.25(c)(3) (Board); 12 CFR 339.3(c) (FDIC); 12 CFR 614.4930(c) (FCA); and 12 CFR 760.3(c) (NCUA).

<sup>38</sup> 12 CFR 22.3(c)(3) (OCC); 12 CFR 208.25(c)(3)(iii) (Board); 12 CFR 339.3(c)(3) (FDIC); 12 CFR 614.4930(c)(3) (FCA); and 12 CFR 760.3(c)(3) (NCUA).

lender may accept the policy without further review to determine whether the policy meets the definition of private flood insurance. However, a lender must also ensure compliance with the mandatory purchase requirement. *See* Q&A Mandatory 7.

## II. Private Flood Insurance—Discretionary Acceptance

Discretionary 1. Are lenders required to accept flood insurance policies that meet the discretionary acceptance criteria?

No, the discretionary acceptance criteria in the Regulation sets forth the minimum acceptable criteria that a flood insurance policy must have for the lender to accept the policy under the discretionary acceptance provision. It is at the lender’s discretion to accept a policy that meets the discretionary acceptance criteria so long as the policy does not meet the mandatory acceptance criteria.

Discretionary 2. If the lender determines that a flood insurance policy meets the discretionary acceptance criteria and accepts that policy, what documentation will demonstrate that the policy provides sufficient protection of the loan, consistent with general safety and soundness principles?

The Regulation requires the lender to document its conclusion in writing that the policy provides sufficient protection of the loan, consistent with general safety and soundness principles (*see also* Q&A Coverage 1). While the Regulation does not require any specific documentation to demonstrate that the policy provides sufficient protection of the loan, lenders may include any information that reasonably supports the lender’s conclusion following review of the policy.

Discretionary 3. How can a lender evaluate the sufficiency of an insurer’s solvency, strength, and ability to satisfy claims when determining whether a flood insurance policy provides sufficient protection of the loan, consistent with general safety and soundness principles?

A lender may evaluate an insurer’s solvency, strength, and ability to satisfy claims by obtaining information from the State insurance regulator’s office of the State in which the property securing the loan is located, among other options. A lender can rely on the licensing or other processes used by the State insurance regulator for such an evaluation. *See* Q&A Coverage 1.

Discretionary 4. If a flood insurance policy issued by a private insurer that was originally accepted in accordance with the discretionary acceptance requirements is renewed annually, is the lender required to review the policy upon renewal?

If a lender had accepted a flood insurance policy issued by a private insurer in accordance with the discretionary acceptance requirements and the policy is renewed, the lender must review the policy upon renewal to ensure that it continues to meet the discretionary acceptance requirements.<sup>39</sup> The lender must also document its conclusion regarding sufficiency of the protection of the loan in writing upon each renewal to indicate that the policy continues to provide sufficient protection of the loan.<sup>40</sup>

### III. Private Flood Insurance—Private Flood Compliance

Private Flood Compliance 1. What is the maximum deductible a flood insurance policy issued by a private insurer can have for residential or commercial properties located in an SFHA?

The maximum deductible for a flood insurance policy issued by a private insurer varies depending on whether the lender accepts the policy under the mandatory acceptance or the discretionary acceptance provision. For purposes of compliance with the mandatory acceptance provision, the Regulation provides that a policy must contain a deductible that is “at least as broad as” in a Standard Flood Insurance Policy (SFIP)—*i.e.*, no higher than the specified maximum under an SFIP—for any total coverage amount up to the maximum available under the NFIP at the time the policy is provided to the lender.<sup>41</sup> For a private policy with a coverage amount exceeding that available under the NFIP, the deductible may exceed the specific maximum deductible under an SFIP. However, for safety and soundness purposes, the lender should consider whether the deductible is reasonable based on the borrower’s financial condition, among other factors. *See* Q&A Amount 9.

• For example, if a private policy for a commercial building provided \$1,000,000 of flood insurance coverage,

which is in excess of the NFIP maximum coverage of \$500,000 for a commercial building, then it would be acceptable for a million-dollar policy to have a deductible higher than the maximum deductible for a policy available under the NFIP. The lender should consider whether the deductible is reasonable based on the borrower’s financial condition.

• Similarly, if a private policy for a residential building provided \$1,000,000 of flood insurance coverage, which is in excess of the NFIP maximum coverage of \$250,000 for a residential building, then it would be acceptable for a million-dollar policy to have a deductible higher than the maximum deductible for a policy available under the NFIP. The lender should consider whether the deductible is reasonable based on the borrower’s financial condition.

For purposes of compliance with the discretionary acceptance provision, the Regulation requires that the policy provide sufficient protection of the loan, consistent with general safety and soundness principles.<sup>42</sup> Among the factors a lender could consider in determining whether a policy provides sufficient protection of a loan is whether the policy’s deductible is reasonable based on the borrower’s financial condition. Unlike the limitation on deductibles for policies accepted under the mandatory acceptance provision for any total coverage amount up to the maximum available under the NFIP, a lender can accept a flood insurance policy issued by a private insurer under the discretionary acceptance provision with a deductible higher than that for an SFIP for a similar type of property, provided the lender has determined the policy provides sufficient protection of the loan, consistent with general safety and soundness principles.

Whether the lender is evaluating the policy under the mandatory acceptance provision or the discretionary acceptance provision, a lender may not allow the borrower to use a deductible amount equal to the insurable value of the property to avoid the mandatory purchase requirement for flood insurance.<sup>43</sup> *See* Q&A Amount 9.

Private Flood Compliance 2. May a lender require that the deductible of any flood insurance policy issued by a private insurer be lower than the maximum deductible for an NFIP policy?

Yes. If the lender is accepting the private flood insurance policy under the mandatory acceptance provision, the Regulation requires that the private flood insurance policy be at least as broad as an NFIP policy, which includes a requirement that the private flood insurance policy contain a deductible *no higher* than the specified maximum deductible for a Standard Flood Insurance Policy (SFIP).<sup>44</sup> The lender may require a borrower’s private flood insurance policy deductible be lower than the maximum deductible for an NFIP policy in connection with a policy that the lender accepts under the mandatory acceptance provision, consistent with general safety and soundness principles and based on a borrower’s financial condition, among other factors.

If the lender is accepting a flood insurance policy issued by a private insurer under the discretionary acceptance provision, the lender need only consider whether the policy, including the stated deductible, provides sufficient protection of the loan, consistent with general safety and soundness principles.<sup>45</sup> *See also* Q&A Private Flood Compliance 1.

Private Flood Compliance 3. If a lender utilizes a third party to review flood insurance policies, would it be permissible for a lender to charge the borrower a fee for this review?

The Act and the Regulation do not prohibit lenders from charging fees to borrowers for contracting with third parties to review flood insurance policies. As explained in Q&A Fees 1 and Q&A Fees 2, lenders may charge limited, reasonable fees for flood determinations and life-of-loan monitoring. Similarly, the Act and the Regulation do not prohibit lenders from charging a fee to a borrower when a third party reviews a flood insurance policy issued by a private insurer. However, lenders should be aware of any other applicable requirements regarding fees and disclosures of fees.

<sup>39</sup> 12 CFR 22.3(c) (OCC); 12 CFR 208.25(c)(3) (Board); 12 CFR 339.3(c) (FDIC); 12 CFR 614.4930(c) (FCA); and 12 CFR 760.3(c) (NCUA).

<sup>40</sup> 12 CFR 22.3(c)(3) (OCC); 12 CFR 208.25(c)(3)(iii) (Board); 12 CFR 339.3(c)(3) (FDIC); 12 CFR 614.4930(c)(3) (FCA); and 12 CFR 760.3(c)(3) (NCUA).

<sup>41</sup> 12 CFR 22.2(k) (OCC); 12 CFR 208.25(b)(9) (Board); 12 CFR 339.2 (FDIC); 12 CFR 614.4925 (FCA); and 12 CFR 760.2 (NCUA).

<sup>42</sup> 12 CFR 22.3(c)(3)(iv) (OCC); 12 CFR 208.25(c)(3)(iii)(D) (Board); 12 CFR 339.3(c)(3)(iv) (FDIC); 12 CFR 614.4930(c)(3)(iv) (FCA); and 12 CFR 760.3(c)(3)(iv) (NCUA).

<sup>43</sup> 12 CFR 22.3(a) (OCC); 12 CFR 208.25(c)(1) (Board); 12 CFR 339.3(a) (FDIC); 12 CFR 614.4930(a) (FCA); and 12 CFR 760.3(a) (NCUA).

<sup>44</sup> 12 CFR 22.2(k)(2)(iii) (OCC); 12 CFR 208.25(b)(9)(ii)(B) (Board); 12 CFR 339.2 (FDIC); 12 CFR 614.4925 (FCA); and 12 CFR 760.2 (NCUA).

<sup>45</sup> 12 CFR 22.3(c)(3)(iv)(D) (OCC); 12 CFR 208.25(c)(3)(iii)(D) (Board); 12 CFR 339.3(c)(3)(iv) (FDIC); 12 CFR 614.4930(c)(3)(iv) (FCA); and 12 CFR 760.3(c)(3)(iv) (NCUA).

Private Flood Compliance 4. If the policy is not available prior to closing, what can the lender rely on to make sure the policy meets the requirements of the Regulation?

The Act and Regulation do not specify the acceptable types of documentation for a lender to rely on when reviewing a flood insurance policy issued by a private insurer. Lenders should determine whether they have sufficient evidence to show the policy meets the requirements under the Regulation.

Lenders can take steps to help mitigate against closing delays such as designating employees responsible for reviewing flood policies, training employees, and requesting additional information from insurers early in the process. If the lender does not have enough information to determine if the policy meets the private flood insurance requirements under the Regulation, then the lender should timely request additional information as necessary to complete its review.

Private Flood Compliance 5. Under existing force placement requirements, a declarations page is sufficient to evidence a borrower's purchase of a flood insurance policy. Does the declarations page have sufficient information for a lender to determine whether the policy complies with the Regulation?

It depends. If the declarations page provides enough information for the lender to determine whether the policy meets the mandatory acceptance provision or discretionary acceptance provision of the Regulation or if the declarations pages contain the compliance aid assurance clause, then the lender may rely on the declarations pages. However, if the declarations page does not provide enough information for the lender to determine whether the policy satisfies the mandatory acceptance provision or discretionary acceptance provision of the Regulation, the lender should request additional information about the policy to aid in making its determination.

Private Flood Compliance 6. May a lender accept a multiple-peril policy issued by a private insurer to satisfy the mandatory purchase of flood insurance requirement?

Yes. A lender can accept a multiple-peril policy that covers the hazard of flood under the private flood insurance provisions of the Regulation, provided the policy meets the requirements under the Regulation.

Private Flood Compliance 7. How do the private flood insurance requirements of the Regulation, especially the compliance aid assurance clause, work in conjunction with the requirements from secondary market investors (for example, the Federal National Mortgage Association (Fannie Mae) or the Federal Home Loan Mortgage Corporation (Freddie Mac))?

Lenders must comply with Federal flood insurance requirements. The requirements for the secondary market are separate from the Regulation. A lender should carefully review these separate requirements for secondary market investors regarding acceptable private flood insurance if the lender plans to sell loans to such investors and should direct questions regarding these requirements to the appropriate entities.

Private Flood Compliance 8. When servicing a loan covered by flood insurance pursuant to the Act and the Regulation, which requirements must a servicer follow in evaluating the acceptance of a flood insurance policy issued by a private insurer?

For loans serviced on behalf of lenders supervised by the Agencies, the servicer must comply with the Regulation in determining whether a flood insurance policy issued by a private insurer must be accepted under the mandatory acceptance provision or may be accepted under the discretionary acceptance provision or mutual aid provision. For loans serviced on behalf of other entities not supervised by the Agencies, the servicer should comply with the terms of its contract with that entity. For example, when servicing loans on behalf of Fannie Mae or Freddie Mac, where there are insurer rating requirements specified within those entities' servicing guidance or other relevant authorities that are not required in the Regulation, the servicer should adhere to those servicing requirements.

Private Flood Compliance 9. How can a lender determine: (i) Whether an insurer is licensed or admitted in a particular State, (ii) or whether a surplus lines or nonadmitted alien insurer is permitted to issue an insurance policy in a particular State?

A lender may refer to the website of the State insurance regulator where the collateral property is located to determine whether a particular insurer is licensed, admitted, or otherwise permitted to issue an insurance policy in a particular State. If the lender cannot determine this information from the website, the lender could contact the

State insurance regulator directly. Further, information with respect to surplus lines insurer eligibility also may be available in the Consumer Insurance Search (CIS) tool available on the National Association of Insurance Commissioners (NAIC) website. Lenders may consult commercial service providers regarding the eligibility of surplus lines insurers in particular States provided the lenders have a reasonable basis to believe that these service providers have reliable information.

With regard to nonadmitted alien insurers in particular, lenders could review the NAIC's Quarterly Listing of Alien Insurers.<sup>46</sup>

Private Flood Compliance 10. May lenders accept policies issued by private insurers that are surplus lines insurers for noncommercial residential properties?

Yes, if the surplus lines insurer is eligible or not disapproved to place insurance in the State or jurisdiction in which the property to be insured is located, lenders may accept policies issued by surplus lines insurers as coverage for noncommercial (*i.e.*, residential) properties.

Consistent with the Act and the Regulation, the Agencies confirm that policies issued by surplus lines insurers for noncommercial properties are covered in the definition of "private flood insurance" and in the discretionary acceptance provision. In the definition of "private flood insurance," surplus lines policies for noncommercial properties are covered as policies that are issued by insurance companies that are "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."<sup>47</sup> Similarly, within the discretionary acceptance provision, noncommercial residential policies issued by surplus lines carriers are covered as policies that are issued by private insurance companies that are "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."<sup>48</sup>

For purposes of the Regulation, the meaning of "otherwise approved" is

<sup>46</sup> See 15 U.S.C. 8204.

<sup>47</sup> See 84 FR 4955–4956 (Feb. 20, 2019). See also 12 CFR 22.2(k)(1)(i) (OCC); 12 CFR 208.25(b)(9)(i)(A) (Board); 12 CFR 339.2 (FDIC); 12 CFR 614.4925 (FCA); and 12 CFR 760.2 (NCUA).

<sup>48</sup> See 84 FR 4962 (Feb. 20, 2019). See also 12 CFR 22.3(c)(3)(ii) (OCC); 12 CFR 208.25(c)(3)(iii)(B) (Board); 12 CFR 339.3(c)(3)(ii) (FDIC); 12 CFR 614.4930(c)(3)(i) (FCA); and 12 CFR 760.3(c)(3)(ii) (NCUA).

based on whether applicable State law provides that the surplus lines insurer is eligible or not disapproved to place insurance in that State. Even if the surplus lines insurer is not considered to be engaged in the business of insurance under applicable State law, the surplus lines insurer would still be “otherwise approved” only for purposes of this provision of the Regulation if the insurer is eligible or not disapproved to place insurance in the State.

Private Flood Compliance 11. May a lender accept a private flood insurance policy that includes a compliance aid assurance clause, but also includes a disclaimer explaining that the “insurer is not licensed in the State or jurisdiction in which the property is located,” which suggests that the policy is issued by a surplus lines insurer?

Even if the policy includes a statement indicating that the insurer is not licensed in the State or jurisdiction in which the property is located, suggesting that the policy is issued by a surplus lines insurer, there are circumstances under which lenders may accept the policy. A lender may accept a policy issued by a surplus lines insurer recognized or not disapproved by the relevant State insurance regulator as protection for loan collateral that is a commercial property. Also, a lender may accept a policy issued by a surplus lines insurer as protection for loan collateral that is a noncommercial property as a policy issued by an insurance company that is “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.” See Q&A Private Flood Compliance 10.

**Blake J. Paulson,**

*Acting Comptroller of the Currency.*

**Ann Misback,**

*Secretary of the Board.*

Federal Deposit Insurance Corporation.

Dated at Washington, DC, on or about January 12, 2021.

**James P. Sheesley,**

*Assistant Executive Secretary.*

Dated at McLean, VA, this 1st day of March 2021.

**Dale Aultman,**

*Secretary, Farm Credit Administration Board.*

**Melane Conyers-Ausbrooks,**

*Secretary of the Board, National Credit Union Administration.*

[FR Doc. 2021-05314 Filed 3-17-21; 8:45 am]

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## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

#### 21 CFR Part 1308

[Docket No. DEA-806]

#### Schedules of Controlled Substances: Placement of Four Specific Fentanyl-Related Substances in Schedule I

**AGENCY:** Drug Enforcement Administration, Department of Justice.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Drug Enforcement Administration proposes placing ethyl (1-phenethylpiperidin-4-yl)(phenyl)carbamate (fentanyl carbamate), *N*-(2-fluorophenyl)-*N*-(1-phenethylpiperidin-4-yl)acrylamide (*ortho*-fluoroacryl fentanyl), *N*-(2-fluorophenyl)-*N*-(1-phenethylpiperidin-4-yl)isobutyramide (*ortho*-fluoroisobutyryl fentanyl), and *N*-(4-fluorophenyl)-*N*-(1-phenethylpiperidin-4-yl)furan-2-carboxamide (*para*-fluoro furanyl fentanyl), including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, in schedule I of the Controlled Substances Act. These four specific substances fall within the definition of fentanyl-related substances set forth in the February 6, 2018, temporary scheduling order. Through the Temporary Reauthorization and Study of the Emergency Scheduling of Fentanyl Analogues Act, which became law on February 6, 2020, Congress extended the temporary control of fentanyl-related substances until May 6, 2021. If finalized, this action would make permanent the existing regulatory controls and administrative, civil, and criminal sanctions applicable to schedule I controlled substances on persons who handle (manufacture, distribute, reverse distribute, import, export, engage in research, conduct instructional activities or chemical analysis, or possess), or propose to handle fentanyl carbamate, *ortho*-fluoroacryl fentanyl, *ortho*-fluoro isobutyryl fentanyl, and *para*-fluoro furanyl fentanyl.

**DATES:** Comments must be submitted electronically or postmarked on or before April 19, 2021.

Requests for hearing and waivers of an opportunity for a hearing or to participate in a hearing must be received on or before April 19, 2021.

**ADDRESSES:** To ensure proper handling of comments, please reference “Docket No. DEA-806” on all electronic and written correspondence, including any attachments.

• *Electronic comments:* Interested persons may file written comments on

this proposal in accordance with 21 CFR 1308.43(g). The Drug Enforcement Administration (DEA) encourages that all comments be submitted electronically through the Federal eRulemaking Portal which provides the ability to type short comments directly into the comment field on the web page or to attach a file for lengthier comments. Please go to <http://www.regulations.gov> and follow the online instructions at that site for submitting comments. Upon completion of your submission you will receive a Comment Tracking Number for your comment. Please be aware that submitted comments are not instantaneously available for public view on [Regulations.gov](http://www.Regulations.gov). If you have received a Comment Tracking Number, your comment has been successfully submitted and there is no need to resubmit the same comment. Commenters should be aware that the electronic Federal Docket Management System will not accept comments after 11:59 p.m. Eastern Time on the last day of the comment period.

• *Paper comments:* Paper comments that duplicate the electronic submission are not necessary. Should you wish to mail a paper comment *in lieu of* an electronic comment, it should be sent via regular or express mail to: Drug Enforcement Administration, Attn: DEA Federal Register Representative/DPW, 8701 Morrisette Drive, Springfield, Virginia 22152.

• *Hearing requests:* Interested persons may file a request for hearing or waiver of hearing pursuant to 21 CFR 1308.44 and in accordance with 21 CFR 1316.45 and/or 1316.47, as applicable. All requests for hearing and waivers of participation must be sent to: Drug Enforcement Administration, Attn: Administrator, 8701 Morrisette Drive, Springfield, Virginia 22152. All requests for hearing and waivers of participation should also be sent to: (1) Drug Enforcement Administration, Attn: Hearing Clerk/OALJ, 8701 Morrisette Drive, Springfield, Virginia 22152; and (2) Drug Enforcement Administration, Attn: DEA Federal Register Representative/DPW, 8701 Morrisette Drive, Springfield, Virginia 22152.

**FOR FURTHER INFORMATION CONTACT:**

Terrence L. Boos, Drug and Chemical Evaluation Section, Diversion Control Division, Drug Enforcement Administration; Mailing Address: 8701 Morrisette Drive, Springfield, Virginia 22152; Telephone: (571) 362-3249.

**SUPPLEMENTARY INFORMATION:**