WISCONSIN BANKERS ASSOCIATION

December 10, 2013

VIA ELECTRONIC DELIVERY

Legislative and Regulatory Activities Division,
Office of the Comptroller of the Currency
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Washington, DC 20219
regs.comments@occ.treas.gov
Docket ID OCC-2013-0015

Mr. Robert E. Feldman, Executive Secretary
Attention: Comments/Legal ESS
Federal Deposit Insurance Corporation
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Washington, DC 20429
comments@FDIC.gov
RIN 3064-AE03

Mr. Gerard Poliquin, Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314-3428
regcomments@ncua.gov
RIN 3133-AE18

Mr. Robert deV. Frierson, Secretary
Board of Governors of the Federal
Reserve System
20th Street and Constitution Ave NW
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RIN 7100 AE-00

Mr. Barry F. Mardock, Deputy Director
Office of Regulatory Policy
Farm Credit Administration
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RIN 3052-AC93

Re: Loans in Areas Having Special Flood Hazards Proposed Rule; OCC Docket ID OCC-2013-0015; FRB RIN 7100 AE-00; FDIC RIN 3064-AE03; FCA RIN 3052-AC93; and NCUA RIN 3133-AE18.

Dear Sirs and Madams:

The Wisconsin Bankers Association (WBA) is the largest financial trade association in Wisconsin, representing approximately 300 state and nationally chartered banks, savings and loan associations, and savings banks located in communities throughout the state. WBA appreciates the opportunity to comment on the Office of the Comptroller of the Currency's (OCC's), Board of Governors of the Federal Reserve System's (FRB's), Federal Deposit insurance Corporation's (FDIC's), Farm Credit Administration's (FCA's), and National Credit Union Administration's (NCUA's) (collectively, the Agencies') proposed rule regarding loans in areas having special flood hazards which would amend respective regulations to implement provisions of the Biggert-Waters Flood Insurance Reform Act (Act).

WBA recognizes Congress' motivation for the unprecedented changes made to the National Flood Insurance Program (NFIP) as a result of the enactment of the Act; however, the legislation has generated a number of interpretive issues which require careful regulatory implementation. WBA cautions the Agencies to reconsider the costs and benefits of the provisions presented in the proposal, and to exercise discretion in promulgating a rule that does not inadvertently cause consumer harm or extend beyond congressional intent.

WBA appreciates the Agencies' efforts to address a number of these issues within the proposal, including: (1) an express exclusion of commercial- or agricultural-purpose loans even if the loan is secured by residential property located in a flood zone; (2) the creation of a safe harbor permitting creditors to rely upon the expertise of State insurance authorities to make the determination that the terms of a particular policy are consistent with the statutory definition of private flood insurance; and (3) the exclusion of subordinate liens from the escrow requirement when a lender has determined at

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origination of the subordinate lien transaction that the borrower has obtained flood insurance that satisfies the mandatory purchase requirement and is currently paying flood insurance premiums and fees into an escrow account that has been established by the first lienholder.

WBA offers the following specific comments to further assist the Agencies with the promulgation of a final rule.

Additional Safe Harbor for Private Flood Insurance Policies is Needed

As mentioned above, the Agencies have proposed a safe harbor for private flood insurance policies. Under the proposed safe harbor, a policy would be deemed to meet the statutory definition of "private flood insurance" if a State insurance regulator makes a written determination that the policy meets the definition. WBA supports the inclusion of this proposed safe harbor; however, no such mechanism currently exists for State insurance authorities to make such a determination. WBA fears not only the time it will likely take to create such a mechanism, but also of inconsistencies in the implementation of each State's mechanism since each State retains independent authority over the business of insurance conducted within its borders. Therefore, WBA recommends that the Agencies provide an additional safe harbor based upon a certification issued by the insurer issuing the private flood insurance policy.

WBA recommends a safe harbor for situations in which an insurer issuing a private flood insurance policy provides some type of certification that the policy conforms to the minimum requirements for private flood insurance, in the form of a written endorsement to the policy or on company letterhead accompanying the policy or other evidence of insurance, which would be a legally binding agreement on the part of the insurer. We believe this additional option would allow for both a policyholder and creditor to rely upon the certification and to bring legal action against the insurer should the insurer not adhere to the terms of the certification, just as with any other policy term or condition. State insurance authorities would also have the power to investigate and exercise enforcement authority over insurers that fail to adhere to policy terms and conditions. This additional safe harbor would also provide a reasonable and safe option for financial institutions to accept private flood insurance policies, one of the express goals of the Act.

All Subordinate Liens Should be Excluded at Origination from Escrow Requirement for Life of Loan

WBA supports the proposed exclusion for subordinate liens, as outlined above, as we believe the rationale for such an exemption is consistent with the requirements of the mandatory purchase obligation and existing Agency guidance which describes supervisory expectations for coordination between first and subordinate lienholders.

Currently, because there can only be one NFIP flood insurance policy insuring a building, when a financial institution makes, increases, extends or renews (collectively known as a "triggering event") a subordinate lien loan secured by a building located in a special flood hazard area, the institution must work with the borrower and the senior lienholder to ensure compliance with the mandatory purchase obligation. Together they must ensure that: (1) adequate flood insurance is in place by taking into consideration the factors which make up that determination under existing regulations; and (2) the subordinate lienholder's name is added to the existing flood insurance policy as a mortgagee/loss payee. It is, however, the responsibility of the senior lienholder to receive and pay the flood insurance, as it would not be practical for both financial institutions to be involved in escrowing, receiving notices, and paying premiums. In most instances doing so would result in double escrow payments, an unfair financial burden to the consumer which would be compounded as flood insurance premiums rise to reflect actuarial risk.

The mandatory purchase obligation requires actions by a financial institution only upon the occurrence of a specific statutory triggering event. Without clear direction by Congress, the Agencies must not expand this obligation by imposing on a subordinate lienholder an ongoing duty to monitor whether: (1) the first lienholder is collecting escrow payments from the borrower; (2) the first lien has been paid off; or (3) the first lienholder is exempt from the escrow requirement. WBA believes that imposing such an obligation would increase origination and servicing costs *significantly*–costs which will ultimately be passed on to

consumers in the form of increased credit costs. For these reasons, WBA strongly urges the Agencies to promulgate a rule that unequivocally excludes all subordinate lien loans from the escrow requirement.

No Collection of Escrow Payments for Existing First Lien Mortgage Loans Unless a Statutory Triggering Event Occurs

To implement the escrow requirement of the Act for existing loans, the Agencies' proposal suggests a staggered implementation process based on the renewal date of a flood insurance policy. WBA appreciates the Agencies' consideration of the burdens imposed on both financial institutions and consumers due to the Act; however, the proposal's staggered implementation period fails to address significant contractual, enforcement and customer relations issues presented by the requirement to extend escrow to existing loans.

Financial institutions often allow consumers with sufficient equity in their home the option of paying their own taxes and fees, including their flood insurance premiums. Additionally, while some uniform mortgage instruments (e.g. Fannie Mae and Freddie Mac) include contractual language that assumes the escrow of taxes, insurance and fees, if the financial institution and consumer agree to waive escrow, the consumer executes a separate document memorializing that agreement at closing. Other consumers may have agreed to pay a higher interest rate over the life of the loan as a condition to waive escrow. It is not clear that a new federal requirement abrogates these contracts.

Also of concern is the significant number of existing consumers that will resist escrow which in turn presents questions about how financial institutions will enforce the obligation. Financial institutions may find themselves in the unworkable situation of being required to force place insurance or treat the loan as if it were in default. Obviously, these scenarios would negatively affect consumers, particularly those who have continued to maintain their own flood insurance but have resisted lender efforts to begin escrowing. Unfortunately, the Agencies have failed to address these types of operational matters under the proposal.

WBA recognizes that the Act states that escrow shall apply to any mortgage "outstanding or entered into" two years after the date of enactment, however, we strongly urge the Agencies to exercise discretion to promulgate a rule that extends escrow to existing loans in a manner that mitigates the potential for consumer harm and does not engender negativity between financial institutions and borrowers.

WBA recommends the Agencies adopt a rule that ties the obligation to establish an escrow account for an existing loan to a statutory triggering event. Such a rule would effectuate the Congressional directive to require escrow for existing mortgage loans, but would do so in a manner that is consistent with the underlying framework of existing mandatory flood insurance rules and would minimize contractual, enforcement, and customer relations concerns.

Escrow Accounts Should Not be Required for Certain Categories of Loans

WBA recommends the Agencies provide an exemption to the escrow requirement for certain types of loans, including: (1) non-performing loans; (2) short term loans; (3) lines of credit; and (4) loans with force-placed insurance. We believe the requirement for escrow in these settings is impracticable.

We recommend that the rule exclude from the escrow requirement non-performing residential mortgage assets–including mortgage loans that have been charged-off, are in bankruptcy, or are in foreclosure. WBA believes the Agencies must recognize that for these non-performing loans, the financial institution is no longer billing the customer. Typically, these non-performing loans have moved from a servicing system to a recovery management account system that lacks escrow capabilities. It would be wasteful to require financial institutions to expend resources to require escrow capacity for these types of loans.

WBA also believes that the rule should expressly exclude from the escrow requirement short term loans–that being loans secured by residential improved real property with a maturity of less than one year. Such loans are often originated for bridge financing or a construction loan on a new home. As the loan will mature before the flood insurance policy is due for renewal, the funds that will have been paid into escrow

each month are unlikely to be disbursed to renew a flood insurance policy. instead they will be returned to the consumer, defeating the purpose of escrow.

WBA also recommends the Agencies expressly exclude lines of credit from the escrow requirement. As these products may provide for any number of advances, repayments and a zero balance, the amount of flood insurance required, and consequently the corresponding flood insurance premium, can vary from year to year. In turn, the flood insurance escrow amount would be difficult to calculate unless the financial institution requires coverage for the full line, regardless of its utilization. In WBA's view, Congress did not intend for consumers to be burdened by a requirement to pay excessive premiums to maintain unnecessary flood insurance coverage, particularly as flood insurance rates increase to reflect actuarial risk. Additionally, there are severe operational matters to consider as some line of credit documents do not require an escrow for hazard insurance, taxes or flood insurance, and loan servicing systems for these products do not support escrows.

Finally, the Agencies have requested comment on whether the escrow requirement should only require escrow for borrower-purchased flood insurance, and expressly exclude instances in which a force-placed policy is established. As a general rule, escrow is intended to assist consumers with cash flow planning by forcing them to save over the course of a year to pay taxes and insurance. In the case of force-placed insurance, the financial institution pays the flood insurance premium, and forced saving by the borrower is unnecessary. However, some financial institutions do collect monthly flood insurance premiums and fees for force-placed insurance, and we urge the Agencies to allow financial institutions discretion in whether to escrow for a force-placed flood insurance policy.

Agencies Must Provide At Least 18 Months after Publication of Final Rule for Implementation

WBA recognizes the escrow provision of the Act provides that the requirements shall apply to any mortgage outstanding or entered into on or after the expiration of the 2-year period from the date of enactment of the Act, and the fact that Congress expressly assigned responsibility to the Agencies for drafting implementing regulations. WBA also recognizes the unique regulatory environment present over the last few years; however, as the industry has only just received the proposed rule, and given that the Agencies must consider comments received prior to issuing a final rule, it will be impossible for institutions to implement the requirements of such a final rule by mid-2014.

The changes to be implemented are vast; they require changes to origination, servicing, booking, and accounting policies, procedures and software to ensure that escrowed funds are collected and released accurately. In an attempt to reduce contractual exposure, some financial institutions may need to amend and re-execute escrow loan documents and security agreements to authorize escrow payment, and notices and RESPA disclosures will have to be created and sent to consumers. Additional employees must be hired and trained to accomplish these tasks and to handle the daily disbursements from escrow. In addition, in anticipation of an increased number of consumer inquiries and complaints–both at the initiation of escrow and annually as consumers have questions about their escrow analysis statements–additional customer service employees must be hired and trained.

This summary description does not adequately convey the nature of all of the work to be accomplished, but it is not possible to achieve all the Agencies propose by July 6, 2014. Thus, WBA strenuously urges the Agencies to establish a compliance date at least 18 months after publication of a final rule.

Agencies Must Provide Additional Clarification and Guidance on Supervisory Expectations for Force Placement; Agencies Must Work Together With FEMA to Update and Maintain Mandatory Purchase of Flood Insurance Guidelines

Through the Act, Congress sought to clarify its expectations for the force placement of flood insurance, particularly to establish rules governing when a consumer may be charged and rules for the termination of a force-placed policy. WBA generally supports the proposed amendment clarifying when a borrower may be charged for a force-placed policy. We also support the proposed amendment that permits a financial

institution to charge a consumer for the cost of premiums and fees incurred beginning on the date on which the flood insurance lapsed or did not provide sufficient coverage.

However, greater clarification is needed to address numerous concerns, including: (1) any potential lapse in coverage; (2) to what date a financial institution should charge back when it is discovered that flood insurance coverage did not provide a sufficient coverage amount; (3) what documentation, beyond a mere declaration page or insurer contact information, constitutes a "sufficient demonstration" of a consumer's existing flood insurance coverage; (4) operational or technical issues related to the termination of force-placed insurance; and (5) supervisory expectations for force placement of flood insurance–such as whether consumer notification to ensure that a flood insurance policy does not expire can be mailed 45 days prior to the policy expiration date or whether the financial institution must wait until the force-placed policy expires and then send notice.

Lastly, WBA urges the Agencies to recognize the magnitude of the changes coming to the NFIP which impact not only financial institutions, but insurance agents and consumers themselves. WBA was extremely disappointed in the Federal Emergency Management Agency's (FEMA's) decision to rescind the *Mandatory Purchase of Flood Insurance Guidelines*, as it was a reliable resource for all parties involved regarding flood insurance requirements. Clear and comprehensive guidance regarding NFIP is absolutely necessary to ensure understanding of the requirements. To comply with mandatory purchase obligations and assist consumers with questions regarding flood insurance, financial institutions must understand the complexities of NFIP and the amendments made by the Act. A lack of comprehension may result in inadvertent policy lapses, regulatory violations, and consumer harm. WBA strongly urges the Agencies to work with FEMA to provide clear and comprehensive guidance to the industry.

Conclusion

WBA recognizes Congress' motivation for the unprecedented changes made to the NFIP as a result of the enactment of the Act; however, the legislation has generated a number of interpretive issues which require careful regulatory implementation. We caution the Agencies to reconsider the costs and benefits presented in the proposal and to exercise discretion in promulgating a rule that does not inadvertently cause consumer harm or extend beyond congressional intent.

WBA supports: (1) an express exclusion of commercial- or agricultural-purpose loans from the proposal even if secured by residential property located in a flood zone; (2) the creation of a safe harbor permitting creditors to rely upon State insurance authorities' determinations that a particular private policy meets the statutory definition of private flood insurance; and (3) the exclusion for subordinate liens from the escrow requirement when an escrow account has been established by the first lienholder.

WBA recommends: (1) an additional safe harbor where an insurer issuing private flood insurance provides some type of certification that it meets the statutory definition of private flood insurance; (2) an exclusion of all loans secured by subordinate liens at origination from the escrow requirement for life of loan; (3) no collection of escrow payments for existing first lien mortgage loans unless a statutory triggering event occurs; (4) an exemption from escrow for non-performing loans, short term loans, lines of credit and loans with force-placed insurance; (5) an implementation date at least 18 months after publication of a final rule; (6) additional clarification and guidance on Agency expectations for force placement of flood insurance; and (7) that the Agencies work with FEMA to update and maintain the *Mandatory Purchase of Flood Insurance Guidelines.*

Once again, we appreciate the opportunity to comment on the Agencies' proposal.

Sincerely,

Rose Oswald Poels
President/CEO