



COVID-19's Impact on Flood Insurance Regulations (Revised)

A question the law firm is frequently receiving during the pandemic is whether a COVID-19 loan modification triggers the flood insurance regulations. In short, the requirement to pull a Standard Flood Hazard Determination Form is triggered when a lender makes, increases, renews or extends (MIREs) a loan secured by a building or mobile home. If that building or mobile home is in a flood zone (what FEMA refers to as a "Special Flood Hazard Area" or "SFHA"), which is an A- or V-rated flood zone, the lender must send the SFHA notice. If the building or mobile home is also in an NFIP-participating community, then the loan is a "designated loan" and the lender must require flood insurance coverage. The flood escrow rules are triggered if a lender MIREs a designated loan secured by residential improved real estate or a mobile home after January 1, 2016, and none of the exceptions apply. In sum, all of these requirements hinge on whether the lender MIREd a loan. So, when a loan modification involves increasing, renewing or extending a designated loan, the flood insurance regulations are triggered.

Another question the law firm continues to receive is what is the new NFIP extended grace period's impact on a lender's force placement obligations. In the May 2020 Newsletter, BCG reported that the NFIP extended its 30-day grace period for renewal payment to 120 days. However, at that point Congress had not revised the Flood Disaster Protection Act (FDPA) nor had the banking agencies revised the flood insurance regulations that implement the FDPA. As a result, it seemed as if the NFIP's grace period extension and other COVID-19 developments did not impact a lender's obligations under the force placement requirements. In that case, a lender must still send the 45-day notice upon the NFIP policy's expiration and force place by day 46, despite the new 120-day grace period.

The banking agencies (the FDIC, FRB, NCUA, and OCC) have issued FAQs that speak to a lender's flood insurance obligations. Three agencies (the FDIC, FRB, and NCUA) reiterated that certain loan modifications are MIRE events. All of these agencies discussed the NFIP extended grace period.

FDIC. The FDIC's FAQs discuss: (i) what are a lender's obligations when a loan modification constitutes a MIRE event; (ii) when a payment deferral is a MIRE event; and (iii) the NFIP extended grace period. Each topic is discussed in turn below.

Loan modifications. The FDIC's FAQs first confirm that a COVID-19 loan modification may be a MIRE event that triggers the flood insurance regulations. For example, if a lender modifies a loan by extending the loan term, the loan modification would be a MIRE event

At the same time, the FDIC recognized that meeting these requirements during the COVID-19 emergency can be difficult and could delay relief for borrowers in need. For these reasons, the FDIC FAQs relax some of the flood insurance regulations' requirements as follows. These relaxed requirements only apply when a lender is working with a COVID-19-impacted borrower.

- **Standard Flood Hazard Determination Form (SFHDF).** A lender may rely temporarily on a loan's previous SFHDF on file rather than obtain a new one during the COVID-19 emergency.
- **Escrow accounts.** A lender may delay establishing an escrow account until after the COVID-19 emergency.
- **SFHA notice.** A lender may delay providing the SFHA notice until after the COVID-19 emergency. Prior to providing written notice, the lender may, at its discretion, choose to use another method to provide this information to the borrower (for example, by email or telephone).

The last point the FDIC made in this FAQ was that lenders should have a system in place to ensure deferred flood insurance requirements are addressed as soon as reasonably practicable. FDIC examiners, under the FDIC's discretionary examination authority, will not criticize lenders' good faith flood insurance compliance efforts to accommodate borrowers in a safe and sound manner during the COVID-19 emergency.

Payment deferrals. The FDIC noted that most payment deferrals (and skip-a-payment programs) are not MIRE events because they typically do not extend the loan. However, if a lender extends the loan term, effectively modifying the loan, it is a MIRE event and if it is a designated loan, the borrower must have flood insurance coverage throughout the extended loan term. Additionally, if a lender increases the loan amount, either through capitalizing interest or adding fees, then this would be a MIRE event if the loan contract did not permit such an increase.

NFIP extended grace period. The FDIC also discussed the extension of the NFIP payment grace period. The FDIC merely stated, "lenders should factor this extended grace period (or as further extended by FEMA) in working with borrowers or with respect to force placement of flood insurance." At this time, it is not clear whether this means lenders may delay force placing flood insurance. Contact the law firm for an update and further guidance.

FRB. Although it answered the questions differently, the FRB also discussed when a COVID-19 loan modification is a MIRE event, and the NFIP extended grace period.

Loan modifications. If a loan modification extends a loan's term, that is a MIRE event. In that case, the lender may have to establish an escrow account for flood insurance payments and fees, obtain a SFHDF, or send an SFHA notice. The FRB confirmed that "[t]he federal flood statutes and the Federal Reserve's implementing regulation do not provide a waiver of these requirements in emergency situations."

However, the FRB stated that during its supervision and enforcement activities, it will take into consideration the unique circumstances COVID-19 caused. The FRB will take into account an institution's good faith efforts demonstrably designed to support consumers and comply with the flood insurance regulations. The FRB expects that supervisory feedback for institutions will be focusing on identifying issues, correcting deficiencies, and ensuring appropriate remediation to consumers. The FRB does not expect to take a public enforcement action against an institution, provided that the circumstances were related to COVID-19 and that the institution made good-faith

efforts to support borrowers and comply with the flood insurance requirements, as well as responded to any needed corrective action.

NFIP extended grace period. The FRB provided some surprising leniency in its FAQ on the NFIP extended grace period. For NFIP policies subject to the 120-day grace period (that is, for NFIP policies that expire anytime from February 13, 2020 through June 15, 2020), the FRB essentially said that the 45-day period under the force placement requirements becomes 120 days. Thus, lenders may wait until the end of the 120-day grace period to force place. However, a lender must force place on day 121 if the borrower does not pay the premium during the 120-day grace period. Lenders may force place during the 120-day grace period, but, the FRB warns, the lender will have to refund any overlapping premiums, as the flood insurance force placement provisions require. For example, if a lender force places on day one, but the borrower pays its NFIP policy's premium on day 100 causing its policy to have continuous coverage, the lender will not be able to charge the borrower for its force-placed policy (that is, the lender will have to absorb those overlapping premiums).

As to the 45-day notice's timing, the FRB provided two alternative time frames. Under the first option, a lender may provide the 45-day notice to the borrower after determining the policy has expired. In that notice, the lender would indicate that the NFIP grace period has been extended for 120 days and may inform borrowers that, in light of the extended grace period, force placement will not occur until after the end of the 120-day period.

The second timing option is to provide the 45-day notice at least 45 days before the end of the 120-day grace period. Regardless of which notice time frame a lender chooses, the lender must force place flood insurance on the borrower's behalf if the borrower does not pay the premium by the end of the 120-day grace period.

Last, the FRB notes that it does not expect to take supervisory or enforcement action against a lender for violating the flood insurance force placement requirements, provided that the circumstances were related to COVID-19, and that the lender has made good-faith efforts to support borrowers and comply with the flood insurance requirements, as well as responded to any needed corrective action.

NCUA. The NCUA also discussed when a COVID-19 loan modification is a MIRE event and the NFIP grace period extension.

Loan Modifications. The NCUA echoed the FRB's response as to loan modifications. Specifically, the NCUA stated that if a loan modification extends a loan's term, that is a MIRE event. In that case, the credit union may have to establish an escrow account for flood insurance payments and fees, obtain a SFHDF, or send an SFHA notice. The NCUA confirmed that "[t]he federal flood statutes and the NCUA's implementing regulation do not provide a waiver of these requirements in emergency situations."

However, the NCUA stated that during its supervision and enforcement activities, it will take into consideration the unique circumstances COVID-19 caused. The NCUA expects that its supervisory feedback will be focusing on identifying issues, correcting deficiencies, and ensuring appropriate remediation to consumers. The NCUA does not expect to take a supervisory or enforcement action against a credit union, provided that the circumstances were related to COVID-19 and that the credit union made good-faith efforts to support borrowers and comply with the flood insurance requirements, as well as responded to any needed corrective action.

NFIP Extended Grace Period. Here too, the NCUA's response closely parallels the FRB's. For NFIP policies subject to the 120-day grace period (that is, for NFIP policies that expire anytime from February 13, 2020 through June 15, 2020), the NCUA essentially said that the 45-day period under the force placement requirements becomes 120 days. Thus, credit unions may wait until the end of the 120-day grace period to force place. However, a credit union must force place on day 121 if the borrower does not pay the premium during the 120-day grace period. Credit unions may force place during the 120-day grace period, but the credit union will have to refund any overlapping premiums, as the flood insurance force placement provisions require. For example, if a credit union force places on day one, but the borrower pays its NFIP policy's premium on day 100 causing its policy to have continuous coverage, the credit union will not be able to charge the borrower for its force-placed policy (that is, the credit union will have to absorb those overlapping premiums).

As to the 45-day notice's timing, the NCUA provided two alternative time frames. Under the first option, a credit union may provide the 45-day notice to the borrower after determining the policy has expired. In that notice, the credit union would indicate that the NFIP grace period has been extended for 120 days and inform borrowers that, in light of the extended grace period, force placement will not occur until after the end of the 120-day period.

The second timing option is to provide the 45-day notice at least 45 days before the end of the 120-day grace period. Regardless of which notice time frame a credit union chooses, it must force place flood insurance on the borrower's behalf if the borrower does not pay the premium by the end of the 120-day grace period.

Last, the NCUA notes that it does not expect to take supervisory or enforcement action against a credit union for violating the flood insurance force placement requirements, provided that the circumstances were related to COVID-19, and that the credit union has made good-faith efforts to support borrowers and comply with the flood insurance requirements, as well as responded to any needed corrective action.

OCC. The OCC FAQs only discuss the NFIP extended grace period's implications on the force placement requirements, and does not discuss when loan modifications are MIRE events. For NFIP policies subject to the 120-day grace period (that is, for NFIP policies that expire between February 13, 2020 and June 15, 2020), the OCC said it does not expect to take supervisory or enforcement action against a bank for reasonable delays in complying with the force placement requirements in connection with the 120-day grace period, provided that the bank made good-faith efforts to support borrowers and comply with the force placement requirements, as well as responded to any needed corrective action identified in supervisory feedback.

At the same time, the OCC reminded banks that the force placement requirements require lenders to refund any overlapping premiums to the borrower. Accordingly, if a bank force places during the 120-day grace period and the borrower pays the premium within that grace period, then the bank must refund the borrower the premium for any overlapping flood insurance coverage. Contact Stephanie Shea at SShea@ABLAWYERS.COM with any questions about flood insurance compliance.