

LEGAL REFERENCES

This appendix references and describes the legal citations of the mandatory purchase sections of the National Flood Insurance Act. The statutory history and authority of various aspects of the Flood Act that pertain to the mandatory purchase provisions are covered.

Federal Insurance Administration & Office of the Administrator

As presently administered, the NFIP is carried out under the auspices of the Federal Emergency Management Agency (FEMA) and its subsidiary agency, the Federal Insurance Administration (FIA). The FIA was initially established under the Housing and Urban Development Act of 1968 as part of the United States Department of Housing and Urban Development (HUD). The agency is headed by the Federal Insurance Administrator, an office authorized by the Urban Property Protection and Reinsurance Act of 1968 (Title XI of the Housing and Urban Development Act of 1968). In 1978, President Carter issued the Reorganization Plan No. 3 of the 1978 (43 FR 41493), creating FEMA, and transferred the functions authorized and described in the National Flood Insurance Act of 1968 and the position of Federal Insurance Administrator to FEMA. The organization of FEMA was further defined in Executive Order 12127, dated March 31, 1979 (44 FR 19367), and Executive Order 12148, dated June 20, 1979. On April 1, 1979, in a notice published in 44 FR 20962, and later codified at 44 CFR §2.64, the Director of FEMA delegated responsibility for the administration of the NFIP to the Federal Insurance Administrator of the FIA, which had become a Directorate within FEMA. The authorization of the Program itself can be found at 42 U.S.C. sec. 4011.

The National Flood Insurance Program

The National Flood Insurance Act, which created the National Flood Insurance Program (NFIP), is codified in the United States Code at 42 U.S.C. 4001 *et seq.* The original act became effective on January 28, 1969, authorized by the National Flood Insurance Act of 1968 (Title XIII of the Housing and Urban Development Act of 1968, as amended, Public Law 90-448, 82 Stat 476). The NFIP is a federally subsidized insurance program that provides flood insurance at or below actuarial rates. The legislative history states Congress created the program because flood insurance was not available from private insurance companies, who were unable to write flood insurance policies on an economically feasible basis. H. Rep. No. 90-1585, 90th Cong., 2d Sess., *reprinted in*, 1968 U.S. Code Cong. & Ad. News 2873, 2965-73; S. Rep. No. 90-1123, 90th Cong., 2d Sess. (1968).

As of October 1, 1983, FEMA instituted what is called the Write Your Own (WYO) Program, whereby private homeowners insurers are also authorized to market NFIP flood coverage in conjunction with property insurance. See 62 CFR Sub-Part C, § 62.23. With the WYO Program, FEMA functions similarly to a reinsurer in accepting the risk of the primary WYO insurer on the line of NFIP business written by the companies. FEMA continues to directly bear the risk for the “direct” insurance program while serving as a guarantor of WYO insurers on WYO business.

Contrary to the practice of the private insurance industry, the NFIP accepts all applicants and is not selective in evaluating an individual applicant for NFIP coverage. There is no individual risk analysis, i.e., underwriting, conducted to determine the likelihood of a future loss. The sole criteria involving whether an applicant will be accepted as an insured involves whether or not the community, in which the property is located, participates in the NFIP, 42 U.S.C. §4012; if so, the property is then rated in accordance with its zone and other criteria such as amount of coverage requested. The NFIP is a "take all comers" insurance entity. Premiums paid are deposited by the Director of FEMA to a National Flood Insurance Fund, 42 U.S.C. 4017(b)(2), which may be augmented when necessary by funds borrowed from the United States Treasury and by appropriations, 42 U.S.C. 4016, 4017(b)(1),(3).

The insurance regulations set out the terms and conditions of flood insurance coverage and rates. All flood insurance made available under the program is subject to the express terms and conditions of the insurance policy, the statute, and the governing regulations, 44 C.F.R. 61.4(a).

The Standard Flood Insurance Policy (SFIP) is set forth at 44 C.F.R. 61, Appendix A(1). The SFIP is a single peril policy that covers flood only and limits coverage both under the insuring clause as well as the exclusions. The regulations prohibit alteration, variation, or waiver of the policy provisions, 44 C.F.R. 61.13(d). The Director is charged with interpreting the meaning of the policy, 44 C.F.R. 61.14(b).

Other statutory references to the Act and its relevant amendments include the National Flood Insurance Act of 1968 (title 13 of the Housing and Urban Development Act of 1968), Pub. L. No. 90-448, 82 Stat. 476(1968) (codified at 42 U.S.C. 4001-4128); the Housing and Urban Development Act of 1969, Pub. L. No. 91-152, 83 Stat. 397 (1969) (codified at 12 U.S.C. section 1703); and the Flood Disaster Protection Act of 1973, Pub. L. No. 93-234, 87 Stat. 975 (1973). The 1994 amendments were accomplished as part of the Riegle Community Development and Regulatory Improvement Act of 1994, Pub.L. 103-325, Title V, 108 Stat. 2257-2260 et.seq., generally referred to as the Reform Act.

The Mandatory Purchase Provisions

The mandatory purchase requirement first appeared in the Flood Disaster Protection Act of 1973. At that time the law required purchase of flood insurance as a condition of obtaining a mortgage loan from federally regulated lending institutions for properties in identified floodprone areas as well as a condition in obtaining federal assistance. The restriction on federal assistance included the receipt of federally related financing by private lending institutions as well as VA and FHA loans. Since flood insurance was available only in communities participating in the National Flood Insurance Program, the result of this legislation was a great increase in the number of communities participating in the program and in the number of policies in force.

The strict 1973 mandatory purchase amendments, however, were met with some criticism. Continuing pressure from contractors and real estate developers resisting the limits on lending and federal assistance to nonparticipating communities resulted in a 1977 amendment that modified §4106 (b) by deleting the original wording which prohibited private regulated lending in nonparticipating communities and in its

Federal Emergency Management Agency

place substituted a notice requirement. This change has come to be known by the name of its sponsor as "The Eagleton Amendment." The 1977 Eagleton amendment was enacted by Pub.L 95-128, Title VII, sec. 703(a), Oct 12, 1977. This amendment deleted from the Act its original § 4106 (b) requirement that Federal regulators issue regulations prohibiting lenders from making conventional loans with respect to property in nonparticipating communities. The notice requirement is contained in the Notice of Special Flood Hazard and Availability of Federal Disaster Relief Assistance. Consequently, lenders regulated by, or whose deposits are insured by, federal instrumentalities may now make conventional loans secured by mortgages on improved real property and mobile homes in areas of special flood hazard in communities that are not participating in the NFIP. They may do so notwithstanding the fact that such property is not eligible for the purchase of National Flood Insurance, and, thus, the mandatory flood insurance purchase requirement does not apply with respect to such loans. However, lenders should carefully evaluate the underwriting risk involved in making such loans. In nonparticipating communities, a lender may require private flood insurance, if available. The notice requirements do not apply to unsecured loans, or to loans secured by improved real property that is not located in an SFHA.

Among other things, the 1977 change, in the short-term, benefited developers who now can obtain federally guaranteed money for floodplain development, but in the long-term works to the detriment of the ultimate, and perhaps unsuspecting, future owner of the structure at the time a flood may occur. The possibility of flood damage is in addition to what could be an excessively high premium in the future if the structure is constructed below "base flood elevation" and the community subsequently joins the program as a participating community.

The mandatory purchase law directs the Federal lending regulators and Government Sponsored Enterprises (GSEs) to adopt regulations requiring lenders subject to their jurisdiction to compel borrowers to purchase flood insurance protecting any "improved real estate or mobile home" located in an area of special flood hazard in a community that is eligible for the purchase of National Flood Insurance, if the building, mobile home, and any personal property securing such loan, is to be the security for the loan.

Each Federal Regulatory Agency and GSE has the right to issue its own regulations to implement the Act, and the authority of the FIA is limited to its statutory responsibility of administering the NFIP. The FIA is not an agency with direct responsibility for implementing enforcement of the mandatory flood insurance purchase requirements of the Act.

Mandatory Purchase of Flood Insurance Guidelines

The 1994 Amendments to the Program

The Riegle Community Development and Regulatory Improvement Act, Pub. L. 103-325, 108 Stat. 2160 (Reform Act), was signed into law on September 23, 1994. As described in these guidelines, the new law substantially amends the existing mandatory purchase provisions.

The flood insurance provisions of the Act require the OCC, Board, FDIC, OTS, and NCUA to revise their current flood insurance regulations. The FCA is required to promulgate flood insurance regulations for the first time. The six agencies issued their regulations jointly in order to fulfill the statutory requirements. All six of the agencies have coordinated and consulted with the Federal Financial Institutions Examination Council (FFIEC), as is required by certain of the Reform Act flood insurance provisions. The CFR citation and reference number of the location of the regulations for the various lender agencies are as follows:

Office of the Comptroller of the Currency (OCC); 12 CFR Part 22
Office of Compliance Specialist (202/874-4858)

Office of Thrift Supervision (OTS); 12 CFR Parts 563 and 572
Office of Compliance and Trust (202/906-5628)

Federal Reserve System (FRS); 12 CFR Part 208
Office of Review Examiner (202/452-3946)

Federal Deposit Insurance Corporation (FDIC); 12 CFR Part 339
Office of Consumer Affairs Specialist (202/942-3631)

Farm Credit Administration (FCA); 12 CFR Part 614
Office of Examination (703/883-4498)

National Credit Union Administration (NCUA); 12 CFR Part 760
Office of Examination and Insurance (703/518-6375)