BUTLER | SNOW

# Quarterly Report

Mississippi Regulatory Compliance Group

*August 2022* *Vol. 33 No. 3*

## RECENT CFPB ACTIONS

With a new confirmed Director, the CFPB has been very active this year in issuing interpretive rules, advisory opinions and requests for information on various topics including credit reporting; late charges and other fees; fair lending and ECOA, and large bank customer service. Here is a quick summary of some of the more significant actions.

1071 Small Business Loan Data Collection. The Bureau issued a proposed rule last September to implement Sec. 1071 of the Dodd-Frank Act to which calls for HMDA-like data collection on small business loans. A final rule has not yet been announced, but in a court filing in California federal court, the Bureau committed to issuing a final rule no later than March 31, 2023.

Fair Lending and Existing Accounts. On May 9, the Bureau issued an advisory opinion regarding the coverage of fair lending laws reminding all creditors that the ECOA protects people from discrimination in all aspects of a credit arrangement, including after they have received a loan, and not just during the application process. Lenders are prohibited from discriminating against borrowers with existing credit. For example, ECOA prohibits lenders from lowering the credit limit on an existing account or subjecting borrowers to more aggressive collection practices on a prohibited basis, such as race. Also, adverse action notices are required when adverse action is taken on an existing account, such as terminating an account, lowering the credit limit or making changes to account terms that are unfavorable to the borrower. Adverse action notices must also explain the principal reasons for the action taken.

AI Credit Scoring Models and Adverse Action Notices. On May 26, the Bureau published Consumer Financial Protection Circular 2022-3 reminding all state and federal agencies with authority to enforce federal consumer financial protection laws of a lender's responsibilities for giving adverse action notices when using complex credit models or algorithms in credit decision-making. FinTechs and some bank lenders are increasingly using sophisticated credit models which often consider non-traditional data in making credit decisions. Some models may also have an "artificial intelligence" or "machine learning" aspect that changes the model or algorithm over time. The Bureau reminds all lenders that adverse action notices must contain an accurate statement of the specific principal reasons for the lender's action. Some models (the Bureau refers to them as "black-box" models) are opaque to the user, and that may make it difficult, if not impossible, to provide an adverse action notice that meets ECOA requirements. When


- Recent CFPB Actions ................................. 1
- CRA Reform ............................................... 5
- More Risky Business .................................. 9
- Revised Flood Q&As ................................ 11
- MRCG and MSRCG August 2022 Meetings ................................................. 15
- MRCG-MSRCG Compliance Calendar ..... 16

a credit scoring model of some type is used, a lender must still state specific, accurate reasons for the decision which must relate to factors actually considered and scored in the system. With some less interpretable models, this may not always be possible.

Unfair Discrimination in Financial Services. In what may be the most significant issuance (for large banks in particular) by it so far this year, the Bureau announced on March 16

Unfair Discrimination in Financial Services. In what may be the most significant issuance (for large banks in particular) by it so far this year, the Bureau announced on March 16 changes to its UDAAP exam procedures. The Bureau said it now include examine large banks for discrimination in areas other than credit, including deposit products and other services. The Bureau's revised exam manual notes that discrimination may meet the criteria for "unfairness" by causing substantial harm to consumers that they cannot reasonably avoid and that is not outweighed by countervailing benefits to consumers or to competition. It noted that discrimination can be unfair even in cases not covered by the ECOA. The Bureau said it would examine for discrimination in all consumer financial markets including credit, servicing, collections, consumer reporting, payments, remittances, and deposits. Examiners will require supervised companies to show their processes for assessing risks and discriminatory outcomes, including documentation of customer demographics and the impact of products and fees on different demographic groups. It will look at how companies test and monitor their decision-making processes for unfair discrimination, as well as discrimination under ECOA. This announcement may present a significant, new challenge for large banks.

State Enforcement of Federal Consumer Financial Protection Laws. On May 19, the Bureau issued an interpretive rule that describes the authority of state attorneys general and state regulators to pursue violators of Federal consumer financial protection laws. The Consumer Financial Protection Act (CFPA), Title X of the Dodd-Frank Act which created the CFPB, also gives enforcement authority to the states. Sec. 1036 of the CFPA makes it unlawful for any covered person (basically, any person that engages in offering or providing a consumer financial product or service) to offer or provide any consumer financial product or service not in conformity with a Federal consumer financial protection law (including any CFPB regulation or order), or to otherwise violate a Federal consumer financial protection law. Under Sec. 1042, state attorneys general and state regulators have the authority to bring an enforcement action to pursue violations of Sec. 1036. So, state attorneys general and state regulators generally have the authority to bring enforcement actions for almost any violation of a Federal consumer financial protection law or regulation against covered persons, and that could include a broader group of covered persons than those that are directly subject to the CFPB's supervisory authority. For example, it would extend to banks smaller than $10 Billion in total assets. Also, state authorities may pursue enforcement actions concurrently with the CFPB, so a CFPB enforcement action would not preclude a state regulator from also pursuing an enforcement action.

This isn't new law. The Bureau appears to be encouraging state regulators and state attorneys general to act and is bolstering their authority to do so.

Mitigating the Financial Consequences of Human Trafficking. On June 23, the Bureau issued a final rule under the FCRA to provide survivors of human trafficking a method for

removing from their credit report adverse information that resulted from human trafficking. It also prohibits a credit bureau from providing a report that contains that adverse information that resulted from trafficking. The rule outlines various ways that individuals can obtain documentation of their status as survivors of trafficking, such as court documents and self-attestations certified by certain governmental entities. Credit bureaus must make available a mailing address and a website address if they provide an online portal, for submission of trafficking documentation. Credit bureaus must block the adverse information promptly and can only decline to block, or rescind a block of, information for limited reasons such as the identity of the survivor cannot be confirmed, the survivor cannot provide proof of a victim determination, or the items of adverse information cannot be identified. The new rule is effective July 25, 2022 and applies to all credit reporting companies including specialty companies that provide things like screening reports for employment, tenant leasing, checks and bank accounts, utilities, retail and gaming.

Permissible Uses of Credit Reports. On July 7, the Bureau issued an advisory opinion reminding credit reporting companies, including specialty companies that provide background screening for employment, and users of those reports that they must have a permissible purpose for furnishing or using a report under the FCRA. Specifically, the advisory opinion says that insufficient identity matching procedures can result in credit reporting companies providing reports to entities without a permissible purpose. For example, when a credit reporting company uses name-only matching procedures, all the information in a credit report may not all correspond to the same, single individual. That means the user could receive a report about a person for whom the user does not have a permissible purpose. It is unlawful to provide reports on multiple people as “possible matches.” Disclaimers about insufficient matching procedures don’t cure the problem. The advisory opinion outlines some of the criminal liability provisions in the FCRA for obtaining a background report on an individual under false pretenses or providing a background report to an unauthorized individual.

Medical Debt and Credit Reports. On a related note, the Bureau has taken aim at unpaid medical bills and credit reporting. On April 20, the Bureau issued a report spotlighting medical billing issues and credit reporting. It found that consumer complaints about medical billing errors and erroneous medical debt information in credit reports have increased significantly in recent years. Consumers report they often receive medical bills that are inaccurate or not owed and that medical debt collectors often use the threat of reporting adverse credit information to force payment. This report follows a bulletin the Bureau issued on January 13 reminding debt collectors and credit bureaus of their legal obligations under the No Surprises Act, a new federal law which is intended to help protect consumers from unexpected medical bills. The bulletin states that the information accuracy and dispute obligations under the FCRA apply to debts stemming from medical bills that exceed the amounts permitted to be charged by the No Surprises Act. Debt collectors may not attempt to collect or report information about medical charges that exceed amounts permitted under the Act. The 3 major credit bureaus are taking steps in response. Effective July 1, they are removing paid medical debt that was in collections from consumer reports. Also, unpaid medical debt will not be included in reports until after one year, and beginning in 2023, medical debts of less than $500 will no longer be included.

Authority to Examine Nonbank Financial Companies. On April 25, the Bureau announced its intention to invoke its dormant authority under the Dodd-Frank Act to examine nonbank financial companies that pose risks to consumers. Dodd-Frank gave the Bureau supervisory and examination authority over large banks greater than $10 billion in assets and nonbank mortgage lenders, private student loan lenders and payday lenders of any size. It also has the authority to examine "larger participants" in nonbank markets for consumer financial services, and the Bureau has issued regulations defining thresholds for entities subject to its supervision in the markets for consumer credit reporting, debt collection, student loan servicing, auto loan servicing and international remittances. The third category subject to CFPB supervision are nonbanks whose activities the Bureau has reasonable cause to determine pose risks to consumers. This authority is not limited to any particular consumer product or service. The Bureau implemented this authority in a procedural rule in 2012 which it hasn't used. It has now issued a further procedural rule to increase transparency in the risk-determination process which involves giving notice and an opportunity to respond to any entity the Bureau determines may cause harm to consumers. The Bureau said it may base its determinations on things like consumer complaints, judicial decisions, whistleblower complaints, information from other state and federal regulators, or news reports. Many of us hope the Bureau makes use of this authority and holds nonbank competitors to the same standards that apply to depository institutions.

Credit Card Penalty Fees. On March 29, the CFPB issued a report showing that credit card issuers charged $12 billion in late fees in 2020. It noted that many major card issuers charge the maximum late fee allowed under the safe harbor provision of Reg. Z. The CARD Act required late fees and other penalty fees charged by card issuers to be reasonable and proportional to the default or violation of the card agreement. Reg. Z includes a safe harbor provision permitting a late charge not to exceed a stated dollar threshold, currently $30 for the first late payment and $41 for subsequent late payments within 6 months. The Bureau noted that subprime and private label cardholders pay late charges that represent a higher percentage of the account balance and that cardholders in low-income areas with a higher minority population paid more in late fees than cardholders in other areas. Following that report, the Bureau in June announced it was beginning a review of credit card penalty fees starting with a look at excessive late fees. The Bureau is currently obtaining information from card issuers about late fees, revenues and expenses. At the same time, it issued an advance notice of proposed rulemaking seeking input on how issuers set late fee amounts, how late fees figure into card issuer profitability, card issuer costs and losses associated with late payments, and other data points. It appears the Bureau may be reconsidering the safe harbor amounts and limits on how card issuers impose late payment charges.

Debt Collector Payment Convenience Fees. On June 29, the Bureau issued an advisory opinion affirming that federal law often prohibits debt collectors from charging what it called "pay-to-pay" fees, i.e., convenience fees for payments made online or by phone. The Fair Debt Collection Practices Act prohibits debt collectors from collecting any amount that is not expressly authorized by the underlying loan or credit agreement or permitted by law. The Bureau interprets this provision to mean that the collection of any fee by a debt collector is prohibited unless the fee amount is expressly provided for in the

consumer's contract or is affirmatively authorized by applicable law. Silence is not an authorization. While the FDCPA does not apply to creditors collecting their own debts in their own names, creditors may will still want to take note of this advisory opinion. It is clearly a continuation of the CFPB's focus on what it calls "junk" fees imposed on consumers.

Relationship Banking and Customer Service. On June 14, the Bureau announced an initiative to investigate and improve customer service at large banks. The Bureau notes various studies indicating that consolidation in the banking industry has had mixed results for consumers and customer service experiences. Large banks have gotten even larger, and there has been a loss of local banks in rural communities, both of which may have contributed to a decline in relationship banking and bank responsiveness to customer problems and requests for information. It is seeking information on a variety of questions including what types of information do consumers request; what types of information do consumers request but are often unable to obtain; what types of customer service experiences have consumers had and do they vary based on the channel used (phone, in-person, online); call wait times; do immigrants or rural or elderly customers experience unique customer service obstacles, fees for customer service features or requests for information and a laundry list of other questions. It is not at all clear how the Bureau may use this information or where this initiative may be headed.

*<Cliff Harrison>*

## CRA REFORM

The three federal banking regulators (Federal Reserve, OCC and FDIC) have finally released a joint proposal to update the regulations implementing the Community Reinvestment Act. CRA regulations have not been revised significantly in over 25 years, and the agencies seemingly could not agree on a framework to overhaul the regulations. As recently as a few years ago, it seemed possible that there could be 3 different CRA compliance schemes depending on a bank's primary federal regulator. This joint proposal hopefully creates a consistent regulatory approach to the CRA framework that was desperately in need of modernization. The agencies' press release highlighted the following key elements of the joint proposal:

- Strengthening the achievement of the purposes of the statute, which include expanding access to credit, investment, and basic banking services in LMI communities.
- Adapting to changes in the banking industry, including mobile and online banking.
- Providing greater clarity and consistency in the application of the regulations.
- Tailoring performance standards for differences in bank size, business models, and local conditions. CRA evaluations and data collection to bank size and type.
- Tailoring data collection and reporting requirements and using existing data when possible.
- Promoting transparency and public engagement.
- Confirming that CRA and fair lending are mutually reinforcing.
- Creating a consistent regulatory approach that applies to banks regulated by all 3 agencies.

The majority of the changes to CRA regulations will affect banks with over $2 billion in assets and would impose additional requirements for banks with over $10 billion in assets. For banks with between $600 million and $2 billion in assets, there are some revisions and new provisions to the regulations. Banks with less than $600 in assets are unaffected by the proposed rule, unless those banks opt in to the Retail Lending Test described below. Nonetheless, banks of all sizes are encouraged to review the proposed rule to understand its potential impact on their CRA programs. Highlights from the proposed rulemaking are described in more detail below.

**Updated asset-size thresholds**

The asset thresholds were increased and will be adjusted annually for inflation. Under the proposed rules, the new thresholds are as follows:

- **Small banks**. Banks with less than $600 million in assets, an increase from $347 million under the current regulations.
- **Intermediate banks**. Banks with assets between $600 million and $2 billion, an increase from between $346 million and $1.384 billion under the current regulations.
- **Large banks**. Banks with assets greater than $2 billion, an increase from $1.384 under the current regulations. Also, additional reporting requirements apply to banks with assets greater than $10 billion.

**New performance tests**

- **Retail Lending Test**. The new Retail Lending Test applies to large and intermediate banks, plus small banks that opt into the Retail Lending Test. Regulators would first apply a retail lending volume screen in each facility-based assessment area to compare a bank's retail loan-to-deposit ratio to that of other banks in the area. If a bank meets or exceeds a threshold of 30% of the market ratio, it would then have its major product lines assessed according to geographic and borrower distribution metrics in each assessment area. A bank that failed to meet this 30% threshold would be rated "Needs to Improve" or "Substantial Compliance" for this test, unless the regulators found the bank had an acceptable basis for not meeting the threshold.

  Major product lines include closed-end home mortgage loans, open-end home mortgage loans, multifamily loans, small business loans, and small farm loans that constitute 15% or more of the dollar value of a bank's retail lending in a particular assessment area. Automobile loans would for the first time qualify for consideration as a major product line. This test would also evaluate a large bank's additional retail lending on an aggregate basis. These "Outside Retail Lending Areas" would allow large and certain intermediate banks (those that generate more than 50% of their retail loans outside of facility-based assessment areas) to receive consideration for lending beyond their facility-based and retail lending assessment areas.

- **Retail Services and Products Test**. The Retail Services and Products Test applies only to large banks and analyzes banks' (i) delivery systems, (ii) credit products, and (iii) for banks with assets greater than $10 billion, or other large banks that request consideration, their deposit products targeted to low- and moderate-income individuals and in low- and moderate-income census tracts in a bank's facility-based assessment areas and at the state, multi-state MSA, and institution

levels. To evaluate a bank's delivery systems, the agencies would analyze branch availability and services, remote service facility availability, and for a bank with assets of over $10 billion, digital and other delivery systems. To evaluate credit products, this test will consider products that facilitate home mortgage and consumer lending targeted to low- and moderate-income individuals (such as small-dollar mortgage products and underwriting consumer lending products using alternative credit histories) and those conducted together with minority depository institutions, women's depository institutions, low-income CUs, and CDFIs. Credit cards and other unsecured consumer loan products would be considered in determining how well a bank is meeting the needs of its communities.

- **Community Development Financing Test**. Applies to large banks and any intermediate bank that chooses to opt-in to it instead of the current Community Development Test. This test measures the aggregate dollar amount of a bank's community development loans and community development investments relative to its deposits. The metric also measures the bank's community development activities against the community development financing of peer banks in the facility-based assessment area and nationwide in metropolitan or nonmetropolitan areas. This test would also consider whether activities (i) serve persistent poverty counties, (ii) serve geographic areas with low levels of community development financing, (iii) serve low-income individuals and families, (iv) support small businesses or small farms, (v) benefit Native American communities, or (vi) result in a new community development financing product or service. This test would also assess the impact of small-dollar contributions to organizations that provide assistance to small businesses to address small business credit needs. The Community Development Financing Test would only be assessed in facility-based assessment areas, but a bank may receive consideration for any qualified community development activity, regardless of location.

- **Community Development Services Test**. The Community Development Services Test applies exclusively to large banks and consists of a mostly qualitative assessment of a bank's community development engagement based on activities that are primarily for community development purposes and are related to the provision of financial services and their impact on the communities. In nonmetropolitan areas, banks may receive credit for certain community development activities, such as volunteer efforts, that are not related to financial services. For large banks with assets over $10 billion, the Community Development Services Test would measure a bank's hours spent per full-time employee on community development services in a facility-based assessment area.

**Redefined assessment areas**

Under the current CRA regulations, a bank must delineate one or more assessment areas within which its CRA performance will be evaluated. A bank's current assessment area includes the areas in which it has its main office, branches, and any deposit-taking ATM, as well as any surrounding areas in which the bank does substantial portion of lending. The proposal retains this method of delineating assessment areas, which it refers to as "facility-based assessment areas." However, large banks must delineate facility-

based assessment areas as entire counties or MSAs instead of portions of these geographies. Large banks must also establish assessment areas outside of their branch network in any MSA where it made at least 100 home mortgage loans or 250 small business loans. In these areas, banks would be evaluated only under the Retail Lending Test described above.

Intermediate and small banks will be able to continue to delineate partial county facility-based assessment areas. However, for intermediate banks that generate over half of their retail loans outside of facility-based assessment areas, and for large banks that generate over half of their retails loans outside of retail lending assessment areas, the Retail Lending Test will apply.

The proposal also gives banks credit for qualifying community development activities in any state or multistate MSA in which they have a facility-based assessment area, and banks would receive consideration for any qualifying activities conducted nationwide.

**Increased transparency**

Under the proposal, the performance of large banks would be measured through a weighted average of the performance scores from all four tests. The Retail Lending Test would make up 45% of the composite rating, the Community Development Financing Test would make up 30%, the Retail Service and Products Test would make up 15%, and the Community Development Services Test would make up the final 10%.

Under the proposal, performance testing for intermediate banks would be weighted equally between the Retail Lending Test and either the current Community Development Test or Community Development Financing Test, as applicable.

The performance scoring system for small banks does not change under the proposal.

**Data collection and reporting**

Under the proposal, large banks must collect, maintain and report data from the new performance tests. Banks with assets over $10 billion would be required to report aggregate deposit amounts from relevant geographical areas and collect and maintain deposit data at the county level. Large banks and certain intermediate banks would be required to collect, maintain, and report community development financing data. Banks over $10 billion would be required to collect, maintain, and report community development services data. Also, the proposal provides for the disclosure of data on a bank's number and percentage of mortgage applications by borrower race and ethnicity based on HMDA data, but this figure would have no direct impact on the conclusions or ratings of the bank's CRA assessment.

**Community Development Activities**

Under current CRA guidelines, any activity that has community development as its "primary purpose" is considered a community development activity. The proposed rule is similar to the current rule but expands the possible community development purposes an activity can have by listing eleven possible community development purposes. These listed purposes are:

1. Affordable housing that benefits low-income or moderate-income individuals;

2. Economic development that supports small business or small farms;

3. Community supportive services that assist low-income or moderate-income individuals;

4. Revitalization activities undertaken in partnership with a federal, state, local, or tribal government that include an explicit focus on revitalizing targeted census tracts;

5. Provision of essential community facilities that benefit residents or targeted census tracts;

6. Provision of essential community infrastructure that benefits residents of targeted census tracts;

7. Recovery activities in a designated disaster area;

8. Disaster preparedness and climate resiliency activities that benefit residents of targeted census tracts;

9. Activities undertaken in partnership with minority depository institutions, women's depository institutions, low-income credit unions, or Community Development Financial Institutions, regardless of geographic area;

10. Financial literacy programs, including housing counseling; and

11. Activities undertaken in Native Land Areas that benefit residents, including low- or moderate-income residents, of those areas.

The proposal provides two approaches to determine if an activity has community development as its primary purpose. The first approach determines whether a majority of dollars, applicable beneficiaries, or housing units at issue are one of the eleven community development purposes. The second approach considers if the express, bona fide intent of the activity is one of the eleven community development purposes and if the activity is specifically structured to achieve, or is reasonably certain to accomplish, that purpose.

The proposal requires the federal banking regulators to maintain an illustrative list of activities that qualify for CRA consideration that would be updated periodically. Banks can receive feedback from its regulator on a proposed activity if the activity would be eligible for CRA consideration before or after the activity.

The proposal's comment period ends on August 5, 2022. While certain provisions will have staggered start dates, the final rule will go into effect on the first day of the first calendar quarter that begins 60 days after publication in the Federal Register. We encourage you all to review the proposed rule and familiarize yourself with the changes to determine its potential impact on your bank.

*<Doug Weissinger>*

## MORE RISKY BUSINESS

In the May newsletter and meetings, we began an ongoing discussion of risk assessments starting with an overall compliance risk assessment and promised more in the future. This month, we will discuss both the BSA risk assessment and the fair lending risk assessment. A risk assessment is a tool for a bank to use to examine its internal policies, practices and procedures in an effort to identify, measure and mitigate risk. Examiners will ask for the bank's risk assessments prior to or at the beginning of the examination process. The findings in the bank's risk assessment may play a role in determining the scope of the examiner's risk-based review - often times focusing more on higher risk areas and not as much on lower risk rated areas.

The fair lending and BSA risk assessments are part of the bank's overall compliance management system. The risk assessments should include reviews of management involvement and understanding of the bank's policies, procedures and practices; review of the bank's policies and procedures; training; and audits and monitoring. The bank should update its risk assessments annually or as otherwise necessary and report its findings to the board for approval. Each individual component of a risk assessment (as outlined below and to be discussed in greater detail during the quarterly meeting) should be risk rated as low, moderate or high. An overall risk rating and explanation of the rating should be provided in the conclusion of each risk assessment.

A bank's BSA risk assessment should evaluate and rate the risk of its customer base, products and services, operations, and geographic locations. Banks should also prepare an OFAC risk assessment. Some choose to include this within the overall BSA/AML risk assessment, while others complete this separately. As part of the risk assessment, it is also a good exercise to review quantitative BSA data such as the number of customers; number of accounts of each type; number of users of each service offered; the number of high-risk accounts including privately owned ATM customers, MSB customers, lottery accounts, IOLTA accounts, nonresident alien accounts, etc. The bank should also quantify the number of SARs, CTRs, and other filings made for the time period covered by the risk assessment. This information will be helpful year after year as you update your risk assessment. A large amount of growth in a particular area could signify the need for action such as increased monitoring, etc., to be taken on the bank's part. The same is true for a significant decrease.

The bank's fair lending risk assessment is a bit more involved than the BSA risk assessment. The Bank should evaluate the risk of the following overall topics (each of which requires a more in-depth review of specific questions that we will address further at the August meeting): adequacy of the bank's fair lending compliance management program; adequacy of the bank's monitoring and reporting on fair lending; assessment of fair lending risk as revealed in connection with regulatory examinations and/or legal proceedings; review of indications of possible overt discrimination; review of possible indications of disparate treatment in underwriting; review of possible indications of disparate treatment in pricing; review of possible indications of disparate treatment by steering (for banks with multiple delivery channels and/or subsidiary or affiliate lenders); review of possible indications of disparate treatment by steering for all banks; review of possible indications of discrimination based on redlining; review of possible indications of disparate treatment in marketing; adequacy of the training of staff with respect to fair lending; and assessment of fair lending risk related to the handling of fair lending complaints.

It is important to always be honest in your evaluation of the bank's risk in all areas. This is an exercise that is meant to aid the bank in determining areas of risk and putting controls in place to mitigate that risk prior to an examiner finding and assessing those areas. If any areas are deemed to be high risk, which some ultimately will be, then that is the time to consider risk mitigants and controls the bank can put into place to lower the risk and monitor that risk. These actions can be documented as part of the risk assessment process and re-evaluated annually as you revisit each risk assessment.

We will walk through conducting both a fair lending and a BSA risk assessment in more detail during the August meeting.

*<Memrie Fortenberry and Patsy Parkin>*

## REVISED FLOOD Q&AS

The five federal regulatory agencies (the FDIC, OCC, NCUA, Federal Reserve and Farm Credit Administration) (collectively, the "Agencies") jointly issued revised Q&As regarding federal flood regulations. The revised Q&As replace Q&S originally published in 2009 and 2010 and consolidate the previous Q&As published in 2020 and 2021. The new Q&As reflect significant updates related to changes in law and cover a broad range of flood topics, including escrow of flood insurance premiums, the detached structure exemption, force placement procedures, and private flood insurance.

The FAQs consist of 144 Q&As divided into 19 categories. The categories have been reorganized to provide a more logical flow through the flood insurance process. Of the 144 Q&As, 67 are new, 38 have been revised, and 39 have no change. Below are some of the new Q&As that have been highlighted by the Agencies.

**Applicability 6**. If a loan is being restructured or modified, does that constitute a triggering event under the Regulation?

The modification or restructuring constitutes a triggering event only if it was not originally contemplated pursuant to the contract. In other words, if the modification or restructuring does not increase, extend, or renew the terms of the loan, it is not a triggering event.

**Applicability 13**. What is a "triggering event"?

If there is a triggering event, what is required under the Regulation? When a loan is made, increased, renewed, or extended ("MIRE" event). If a triggering event occurs, the lender must comply with the flood regulations, including the mandatory flood insurance purchase requirement, the requirement to provide the Notice of Special Flood Hazards to the borrower, the requirement to notify FEMA or the Administrator's designee (the insurance provider) in writing of the identity of the servicer of the loan, and the requirement to escrow for a loan secured by residential property, unless either the lender or the loan qualifies for an exception.

**Applicability 15**. When does mandatory flood insurance on a designated loan need to be in place during the closing process?

Lenders should use the "closing date", which is the day the ownership of property transfers, and differs based on state law. For a refinance, use the consummation date as the "closing date".

**Exemptions 3**. Is a flood hazard determination required even where the secured property may contain detached structures for which coverage is not required under the Regulation?

Yes, flood hazard determinations must first be conducted without regard to whether there may be exempt detached structures.

**Exemptions 4**. If a borrower currently has a flood insurance policy on a detached structure that is part of residential property and the detached structure does not serve as a residence, may the lender or its servicer cancel its requirement to carry flood insurance on that structure?

Lenders are no longer mandated to require flood insurance on a detached structure that is part of a residential property and does not serve as a residence. A lender may allow a borrower to cancel its policy.

**Mandatory 4**. Is a lender required to accept a flood insurance policy issued by a private insurer that includes the compliance aid statement? Conversely, may a lender reject a flood insurance policy issued by a private insurer solely because it does not contain the compliance aid statement?

Lenders are not required to accept a flood insurance policy based only on inclusion of compliance aid statement. It may make its own determination or discretionary authority. If a policy does not include the statement, the lender may not reject the policy solely because it does not include it.

**Mandatory 5**. If a flood insurance policy issued by a private insurer includes the compliance aid statement, does a lender need to conduct an additional review of the policy for compliance with the mandatory acceptance provision of the Regulation?

No, but the lender must make sure that the language of the statement is stated as in the regulations in order to rely on the policy without further review.

**Mandatory 9**. May a lender accept a private flood insurance policy that includes a compliance aid statement, 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?

Lender may accept flood insurance policy with the compliance aid statement even if the policy includes disclaimer "insurer is NOT licensed in state which property is located."

**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.

**Discretionary 4**. What are some factors to consider when determining whether a flood insurance policy issued by a private insurer under the discretionary acceptance provision or a mutual aid plan provides sufficient protection of a loan secured by improved real property located in an SFHA, consistent with general safety and soundness principles?

This question identifies factors a lender may consider in determining if a flood insurance policy issued by a private insurer provides sufficient protection of the loan. These factors include whether:

1. a policy's deductible is reasonable based on the borrower's financial condition;

2. the insurer provides adequate notice of cancellation to the mortgagor and mortgagee to allow for timely force placement of flood insurance, if necessary;

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 regulated 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 solvency, strength, and ability to satisfy claims.

**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?

It depends if the lender accepts the policy under mandatory or discretionary acceptance provisions. If the lender accepts the policy under the mandatory provisions, the policy must provide coverage at least as broad as the coverage provided under an SFIP for the same type of property, including a deductible that 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. 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, subject to safety and soundness considerations.

If the lender accepts the policy under the discretionary acceptance provision, the policy must provide sufficient protection of the loan, consistent with safety and soundness principles. 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. Also, 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 safety and soundness principles.

**Private Flood Compliance 11**. When must a lender review a flood insurance policy issued by a private insurer under the private flood insurance requirements of the Regulation?

Any time the borrower presents new flood insurance, the lender must review to determine if it meets regulatory requirements (even if triggering event has not occurred). Lender may rely on previous review, provided there are no changes to terms of the policy that would affect acceptance or it includes the compliance aid statement. The lender should be sure to have internal controls through appropriate policy, procedures, training, and monitoring.

**Zone 1**. Does a lender need to reconcile a discrepancy between the flood zone designation on the flood determination form and the flood zone associated with a flood insurance policy?

No. Lenders do not need to reconcile or otherwise be concerned with flood zone discrepancy. Flood zone determinations are still required if the property is located in an SFHA.

**Zone 3**. Does a lender need to reconcile a discrepancy between the flood zone designation on the flood determination form and the flood zone associated with a flood insurance policy?

Parties involved in transaction should resolve discrepancy disputes if possible. If all else fails, file an appeal with FEMA.

**Amount 2**. What is the "insurable value" of a building and how is it used to determine the required amount of flood insurance?

The insurable value is generally the same as 100% replacement cost without depreciation. But the lender and borrower may choose from a variety of approaches or methods to establish the insurable value, as long as it is reasonable and supportable.

**Amount 10**. Can a lender accept a blanket flood insurance policy or blanket multi-peril policy covering multiple buildings that includes a per-occurrence deductible, regardless of whether any single building covered by the policy has an insurable value lower than the amount of the deductible?

Yes, a blanket flood policy with a higher deductible than the insurable value is

acceptable. However, a lender may not allow the borrower to use a deductible amount equal to the aggregate insurable value to avoid the mandatory purchase requirement. The lender should determine the reasonableness of the deductible on a case-by-case basis.

**Condo and Co-op 9**. What are the flood insurance requirements for a residential condominium unit or a non-residential condominium unit located in a non-residential condominium building? What are the flood insurance requirements for a non-residential condominium unit located in a residential condominium building?

NFIP coverage is not available for an individual residential condominium unit or for a non-residential condominium unit located in a non-residential condominium building. NFIP coverage is also not available for a non-residential condominium unit located in a residential condominium building.

**Condo and Co-op 10**. What flood insurance requirements apply to a loan secured by a share in a cooperative building that is located in an SFHA?

A co-op unit holder has stock in a corporation but owns no title to the building. So, a loan secured by an owner's share in a co-op is not a designated loan, therefore flood insurance is not required.

**Other Security Interests 7**. Is flood insurance required if a building and its contents both secure a loan, and the building is located in an SFHA in which flood insurance is available?

Flood insurance is required for the building located in the SFHA and any personal property securing the loan. Building and contents will be considered to have sufficient coverage if a reasonable amount is allocated to each category.

**Other Security Interests 9**. Does the Regulation apply when the lender takes a security interest in improved real estate and contents located in an SFHA only as an "abundance of caution"?

Yes, the Regulation still applies and flood insurance may be required if the real estate and contents are taken as security for the loan even in an abundance of caution.

**Other Security Interests 10**. Is flood insurance required if the lender takes a security interest in contents located in a building in an SFHA securing the loan but does not perfect the security interest?

Yes, the Regulation still applies and flood insurance may be required regardless of whether security interest is perfected.

**Escrow 3**. Are lenders required to escrow force-placed insurance?

Yes, the lender must escrow force-placed flood insurance premiums because there is no exception for force-placed insurance.

**Escrow 6**. If a borrower obtains a second mortgage loan for a property located in an SFHA, and it is determined that the first lienholder does not have sufficient flood insurance coverage for both liens and is not currently escrowing for flood insurance, does the junior lienholder have to escrow for the additional amount of flood insurance coverage?

Yes. If adequate coverage has not been obtained by first lienholder, flood insurance must be purchased in connection with second loan and junior lienholder would need to escrow. A junior lienholder is not required to escrow for flood insurance as long as the borrower has obtained sufficient flood insurance coverage.

**Force Placement 6**. Once a lender makes a determination that a designated loan has no or insufficient flood insurance coverage and

sends the borrower a force placement notice, may a lender make a subsequent determination in connection with the initial notification period that the designated loan has no or insufficient coverage and send another force placement notice, effectively providing more than 45 days for the borrower to obtain sufficient coverage?

No. The lender is required to force place flood insurance within 45 days after notice is sent to borrower. There is no extension of the 45 day time period.

**Force Placement 16**. If a lender or its servicer receives a notice of remapping that states that a property has been or will be remapped into an SFHA, what do the Act and Regulation require the lender or its servicer to do?

When the lender or its servicer receives advance notice that a property will be remapped into an SFHA, the effective date of remapping is date on which lender or servicer must determine whether property is covered by sufficient flood insurance. As of the effective date of remapping, if the lender makes the determination that coverage is insufficient, the lender or its servicer must begin the force placement process. A lender may also send notice prior to the effective date of the map change as a courtesy. When a lender receives notice of a remapping after the remapping has occurred, the lender or its servicer should follow the force placement of flood insurance requirements.

Because these are just a sample of the Q&As we encourage you to read the joint release in its entirety, which is available on the federal regulators' websites.

*<Doug Weissinger>*

## MRCG MEETING TO BE HELD ON AUGUST 18, 2022

The MRCG will hold its Quarterly Meeting on August 18, 2022, at the Mississippi Sports Hall of Fame & Museum Conference Center, 1152 Lakeland Drive, Jackson, Mississippi. Registration will begin at 9:00 a.m. with the meeting to begin at 9:30 a.m.

During our August meeting, we will discuss how to perform risk assessments for fair lending and BSA/AML compliance, the proposed interagency rule on CRA modernization, the revised interagency flood insurance Q&As, and an update on recent actions by the CFPB.

As always, the dress code for this occasion is casual, and lunch will be provided. We ask that you fax or e-mail your registration to Liz Crabtree no later than Thursday, August 11, 2022, so that arrangements for lunch can be finalized. We look forward to seeing you there.

*<Cliff Harrison>*

## MSRCG MEETING TO BE HELD ON AUGUST 23, 2022

The MSRCG will hold its Quarterly Meeting on August 23, 2022, at Memphis Botanic Garden in the Goldsmith Room located at 750 Cherry Road, Memphis, Tennessee. Registration will begin at 9:00 a.m. with the meeting to begin at 9:30 a.m.

During our August meeting, we will discuss how to perform risk assessments for fair lending and BSA/AML compliance, the proposed interagency rule on CRA modernization, the revised interagency flood insurance Q&As, and an update on recent actions by the CFPB.

As always, the dress code for this occasion is casual, and lunch will be provided. We ask that you fax or e-mail your registration to Liz Crabtree no later than Thursday, August 18, 2022, so that arrangements for lunch can be finalized. We look forward to seeing you there.

*<Cliff Harrison>*

**MRCG-MSRCG COMPLIANCE CALENDAR**

| | |
|---|---|
| 07/21/2022 - MRCG-MSRCG Joint Steering Committee meeting | 08/23/2022 - MSRCG August Quarterly Meeting |
| 08/01/2022 – Comments due on CFPB advance notice of proposed rulemaking on credit card late fees due | 09/15/2022 - MRCG-MSRCG Joint Steering Committee meeting |
| 08/05/2022 – Comments due on interagency proposed rule on CRA modernization | 10/01/2022 – Mandatory compliance date for revised standard QM loans; GSE QM loan category removed |
| 08/18/2022 - MRCG August Quarterly Meeting | 11/15/2022 – MSRCG November Quarterly Meeting |
| 08/22/2022 – Comments due on CFPB request for information on bank customer service | 11/17/2022 - MRCG November Quarterly Meeting |