BUCKLEY SANDLER

# Legal Issues Faced by Mortgage Lenders

## NAFSMA Annual Meeting


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# Flood Disaster Protection Act

## Mandatory Purchase Requirement

- "Regulated Lending Institutions" and "federal agency lenders"
- Must not make, increase, renew, or extend a mortgage loan secured by improved real estate or a mobile home
- Located in a special flood hazard area in which flood insurance coverage is available through the National Flood Insurance Program
- <u>Unless</u> the building or mobile home and any personal property securing the loan is covered by flood insurance for the <u>term of the loan</u>.

*Similar Requirement for loans purchased by Fannie Mae/Freddie Mac*

# Flood Disaster Protection Act Hot Topics

- **Reauthorization**. What if Congress does not reauthorize the NFIP by July 31st?
  - Must develop contingency plans in advance
  - How will the lender handle loans closing just before the expiration date and after?
  - What will the lender do about policies that are set to expire?
  - How will the lender handle applications during a period of lapse?
  - What will be communicated to borrowers?

# Flood Disaster Protection Act Hot Topics

- **Private Flood Insurance.** When can a lender accept a private flood insurance policy?
  - FDPA requires "flood insurance"
    - Private flood insurance was not generally available when FDPA was enacted
    - FEMA developed six criteria - a private policy containing all six is an acceptable substitute for an NFIP policy
    - Federal banking agencies require banks to evaluate the six criteria when determining whether to accept a private flood insurance policy

# Flood Disaster Protection Act Hot Topics

- **Private Flood Insurance continued…**
  - FEMA issued guidance saying the six criteria are not exclusive – if a lender is satisfied with a policy that does not contain all six criteria, "it is within his authority to accept the private policy"
  - Congress amended the FDPA – directs banking agencies to adopt regulations *requiring* lenders to accept private flood insurance policies that have all six criteria
    - Proposed but not yet adopted
    - Efforts for more amendments

- So… do private policies have to meet the six criteria?

# Preparing For and Responding to Natural Disasters

- Lenders must comply with overlapping and changing legal requirements
- Examples:
  - **Loss Mitigation**
    - Regulation X generally requires a complete loss mitigation application before evaluating a mortgage borrower for a loss mitigation option, such as a loan modification or short sale
    - But servicers may offer: (1) certain short term options; (2) options to borrowers who have not submitted an application; and (3) options that are not based on any evaluation of information submitted by the borrower in connection with a loss mitigation application when the borrower submitted an incomplete application
  - **Forbearance and Foreclosure Moratoriums**
    - Depends on investor/insurer… and the judge

# Preparing For and Responding to Natural Disasters

- **Home Equity Lines of Credit**
  - Regulation Z generally limits a creditor's ability to prohibit draws or reduce the credit limit if borrower is current and has not adversely affected security interest (but there are limited exceptions)
- **Credit Reporting**
  - Lenders appear to have some discretion in reporting accounts that are "affected by a natural or declared disaster"
    - Special Comment AW (Affected by natural or declared disaster)
    - But investors may require lenders to report in a certain manner – for example, FHA requires lenders to suppress reporting delinquencies if borrower is granted disaster-related payment relief and is otherwise performing as agreed, unless such reporting is required for a loan modification
- **Inspecting and securing properties**
  - State and local laws; investor requirements

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