Consumer Real Estate
Servicing and Business Operations

May 20, 2008

Office of the Comptroller
of the Currency
250 E Street, S.W.
Mail Stop 1–5
Washington, DC 20219

Re: OCC Docket OCC-2008-0002
Loans in Areas Having Special Flood Hazards;
Interagency Questions and Answers Regarding
Flood Insurance

Jennifer J. Johnson, Secretary
Board of Governors of the Federal
Reserve System
20th St. and Constitution Ave. N.W.
Washington, DC 20551

Re: Docket No. OP-1311

Robert E. Feldman, Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, Dc 20429

Re: RIN no. 3064-ZA00

Dear Sir or Madam:

Bank of America appreciates the opportunity to comment on the proposed amendment to the 1997 Interagency Questions and Answers for flood insurance, which are designed to help financial institutions meet their responsibilities under the National Flood Insurance Reform Act of 1994 (the "Reform Act"). We support the Agencies' efforts to update and clarify the Questions and Answers through the proposed revisions.

Bank of America operates the largest and most diverse banking network in the United States with $1.6 trillion in total assets and over $800 billion in worldwide deposits. We offer full-service consumer and commercial services in 33 states and the District of Columbia with over 6,100 retail branch locations and over 18,700 ATMs.

We are proud to be one of the leading home finance providers in the nation. In 2007, we served more than 4.3 million households holding mortgage and home equity products. In January, we entered into an agreement to purchase Countrywide Financial Corporation. Subject to regulatory approval and upon completion of this transaction, Bank of America Corporation will be the largest residential mortgage lender and servicer in the United States.

Our comments and suggestions are provided below:

Bank of America, NC1-014-12-33
200 South College Street, Charlotte, NC 28255

Recycled Paper

I. <u>The agencies should provide a clear, objective methodology for determining how much flood insurance is required for purposes of force-placing flood insurance on single-family dwellings</u>

The proposed answer to **<u>Question 7</u>** states that it is important for a lender to "calculate the correct insurable value of improved real property" in order to determine how much flood insurance is required. However, the proposed Answer does not provide a clear, objective standard for lenders to use in determining the "insurable value." The proposed Answer to **<u>Question 56</u>** suggests that the amount of insurance required for forced-placement is the same as the amount of insurance required at the time a loan is made, increased, extended or renewed. Again, though, the proposed Answer does not provide a clear, objective standard for determining how much flood insurance should be maintained for a particular property.

The Agencies should clarify that if no flood insurance was purchased at loan closing or at any time during the life of the loan (*e.g.*, because none was required at the time, but a flood zone change has since occurred), the lender may use the last known hazard insurance amount as an acceptable benchmark for the purpose of determining the "insurable value" in calculating the amount of flood insurance to force-place. As an industry practice, most lenders are using a straight comparison to the hazard insurance policy to assess whether adequate flood insurance coverage is being maintained. The lender would then have the capability to force-place an amount equivalent to either the unpaid principal balance, the maximum limit available, or the last known hazard insurance amount. To ensure a timely and efficient process, a servicer must have some reasonably objective way to determine the "insurable value" of the property at the time of force-placement. The amount of hazard insurance maintained on the property is generally the most up-to-date information available regarding the "insurable value" of the property, and represents an amount that was agreed upon by the borrower and the borrower's agent and insurer.

Further, the Agencies should clarify that if flood insurance coverage was purchased at loan closing, but the borrower's coverage has since lapsed, the lender may use the amount of flood insurance purchased at the time of closing or the last known flood insurance coverage amount purchased, whichever is greater, for the purpose of determining the "insurable value" in calculating the amount to force-place. The lender would then force-place an amount equivalent to either the amount selected, the unpaid principal balance, or the maximum limit available.

As a side point to Question 7, we are requesting that the Agencies seek the inclusion of a standard inflationary clause to the flood policies to help account for recognized appreciation values. While this practice is in effect on hazard policies, the flood policies generally remain static in their coverage limits at the time of renewal. Over the course of time when a property is held by its owner, the hazard policy coverage level may increase while flood remains unchanged. This practice could result in a customer eventually being under-insured at the time of a catastrophic event.

II. <u>The agencies should provide a clear, objective methodology for determining how much flood insurance is required for purposes of force-placing flood insurance on residential condominium units when there is no Residential Condominium Building Association Policy (RCBAP) flood insurance in place.</u>

As stated above, the proposed Answers to Questions 7 and 56 do not provide a clear, objective standard for lenders to use in determining the "insurable value" of the property for purposes of determining the amount of insurance coverage to force-place on single-family dwellings. Determining how much to force-place on residential condominium units is even more difficult because of the lack of information (*i.e.*, number of units) available to calculate the unit owner's coverage. The proposed Answers to **<u>Questions 23 through 29</u>** suggest a methodology for determining the "insurable value" for a residential condominium unit by dividing the "replacement value" of the condominium building by the number of units in the building, however, this approach is not feasible. Industry experience shows that, more than 30% of the time, the number of units is **not** identified on the original flood insurance policies or related documents. Attempts to collect this information are not always successful. We suggest that the Agencies seek the enforcement of the requirement that went into effect in October 2007, to include in all RCBAP documents the actual number of units within a condominium building. Until the number of units consistently appears on every RCBAP document, or on every master hazard insurance policy, the lender should be able to use a different methodology to calculate the number of units .

The Agencies should clarify the following:

(1) If no flood insurance was provided at loan closing or at any time during the life of the loan (*e.g.*, because none was required at the time, but a flood zone change has since occurred), and the number of units **is not** available on the master hazard insurance documents, then the lender should be able to force-place insurance at the lesser of the unpaid principal balance or the statutory limit. This approach is reasonable because, without the number of units, the servicer is unable to determine the amount allocable to the individual unit owner under the methodology set forth in Questions 23 through 29. As part of the forced-placement notification process, the borrower should be informed of the methodology used in determining the amount placed, and reminded of the need to provide the servicer with sufficient documentation to enable it to determine the amount allocable to the individual unit owner (*e.g.*, number of units).

(2) If no flood insurance was provided at loan closing or at any time during the life of the loan (*e.g.*, because none was required at the time, but a flood zone change has since occurred), and the number of units **is** available on the master hazard insurance documents, then the lender should be able to rely upon the master hazard insurance coverage amount as an acceptable benchmark for the purpose of determining the "insurable value" of the condominium complex. Relying upon the number of units indicated, the

lender should then be able to divide the master hazard insurance coverage amount by the number of condominium units to determine the amount allocable to the unit owner. The lender should then be permitted to force-place the lesser of that amount, the unpaid principal balance, or the statutory limit.

(3) If flood insurance was provided at loan closing, and the association's coverage has since lapsed, but **neither the master flood nor hazard insurance documents provide the number of units**, then the lender should be able to force-place the lesser of the unpaid principal balance or the statutory limit. Again, this approach is reasonable because, without the number of units, the servicer is unable to determine the amount allocable to the individual unit owner under the methodology set forth in Questions 23 through 29. As part of the forced-placement notification process, the borrower should be informed of the methodology used in determining the amount placed, and reminded of the need to provide the servicer with sufficient documentation to enable it to determine the amount allocable to the individual unit owner (*e.g.*, number of units).

III. Lenders should be able to rely on the original amount of RCBAP flood insurance provided at loan origination

The proposed answer to **Question 6** states that "sound risk management practices may lead a lender to conduct scheduled periodic reviews that track the need for flood insurance on a loan portfolio." The proposed Answer suggests that circumstances could arise during the life of the loan under which the lender would know or have reason to know that the original RCBAP flood insurance purchased has become deficient. The proposed Answer, however, does not provide any guidance as to the circumstances that would trigger a review and cause a servicer to question the amount of RCBAP insurance that was purchased at loan origination – an amount that was determined to be sufficient by the insurance agent, insurer and condominium association.

Assuming that the lender determines that there is a "gap" in insurance (*i.e.*, the difference between the amount of RCBAP insurance purchased and the amount of insurance required by the lender for safety and soundness reasons), the lender is still unable to determine the amount allocable to the unit owner if the number of units is not provided under the master hazard and/or flood insurance documents.

The proposed answer to **Question 57** states that a lender may not generally rely on gap or blanket insurance as an adequate substitute for NFIP insurance. It further states, however, that in limited circumstances, a gap or blanket policy may satisfy a lender's flood insurance obligations when a lender is unable to force-place private insurance for some reason. As stated above, a servicer is unable to calculate the unit-owner's flood responsibilities if the condominium association does not provide the number of units on its master hazard and flood insurance documents, and thus would be

unable to force-place an amount of flood insurance that complies with the flood laws and regulations.

Therefore, in order to mitigate the potential safety and soundness issues, our recommendation is that deficiency coverage (*i.e.*, blanket or gap coverage) be obtained and paid for by the servicer that will cover the lender for the difference between the amount of RCBAP flood insurance in force at the time of the loss, and allocable to the unit, and the amount of flood insurance required to cover the unpaid principal balance. The deficiency coverage endorsement also covers the lender for any coinsurance penalty incurred under the RCBAP flood policy.

The Agencies should clarify the following:

(1) From a statutory compliance perspective, the lender should be able to rely upon the original amount of RCBAP flood insurance purchased at loan origination, without having to perform additional due diligence during the life of the loan to confirm the adequacy of insurance purchased, unless the loan is increased, extended or renewed. However, from a safety and soundness perspective, if the original RCBAP flood insurance purchased remains unchanged and in force throughout the life of the loan, but a loss occurs in which the amount of insurance is insufficient to cover the lender's unpaid principal balance, then the lender should be able to rely on a blanket policy or endorsement (*e.g.*, a deficiency coverage endorsement) to cover, on an excess basis, the "gap" difference between the amount of RCBAP flood coverage and the unpaid principal balance, plus any potential coinsurance penalty.

(2) If the lender learns that the original RCBAP flood insurance amount has been decreased or determines (through more detailed guidance that the Agencies will provide) that the amount is deficient, then the lender should be able to rely on a deficiency coverage to cover, on an excess basis, the "gap" amount (as defined above) of RCBAP flood coverage and any potential coinsurance penalty, if the association does not increase its limits, or the unit owner does not purchase a dwelling policy to cover the difference.

   a. In the alternative, if the Agencies will not permit a lender to rely on a deficiency coverage, a lender should be able to force-place insurance at the lesser of the unpaid principal balance or the statutory limit, if the association does not increase its limits, or the unit owner does not purchase a dwelling policy to cover the difference. As part of the forced-placement notification process, the borrower should be informed of the methodology used in determining the amount placed, and reminded of the need to provide the servicer with sufficient documentation to enable it to determine the amount allocable to the individual unit owner (*e.g.*, number of units).

b. Further, if the Agencies will not permit a lender to rely on deficiency coverage, and if the number of units is available on the last known master hazard insurance and/or RCBAP flood insurance, then the lender should be able to use the last known RCBAP amount or the last known master hazard amount, whichever is greater, to represent the "insurable value" of the complex. The lender should then be able to force-place the unit owner's portion of the gap amount, the unpaid principal balance, or the statutory limit, whichever is less, if the association does not increase its limits, or the unit owner does not purchase a dwelling policy to cover the difference.

IV. Lenders should not be fined for failing to resolve flood zone discrepancies

The proposed answers to **Questions 64 and 65** requires a lender to be responsible for identifying and resolving discrepancies between flood maps and the flood zone information indicated on insurance documents. This requirement essentially positions the servicer as the arbiter for all flood zone disputes between insurers and flood service providers. Shifting the responsibility to lenders creates a disincentive for insurers and flood service providers to make accurate flood zone determinations. In addition, the practice of "grandfathering" flood policies based on prior Special Flood Hazard Area (SFHA) zones without including a uniform code within the insurance industry to identify these situations would make the application of the proposal cumbersome and inefficient.

The Agencies should reconsider their position on this issue and not cite a lender for failing to resolve a flood zone discrepancy. Discrepancies should be resolved by flood service providers and insurers.

V. Guidance should be provided on the necessary level of flood insurance for construction loans

The proposed answer to **Question 19** states that a lender on a construction loan must require "adequate flood insurance" for the term of the loan. The proposed Answer provides guidance as to when such insurance is required, but it provides no guidance as to what coverage amount constitutes "adequate flood insurance" during the course of construction. Is the expectation that the coverage will be for the planned assessment value of the building (less land) once construction is completed, or is a different approach acceptable? The Agencies should provide clear guidance to provide actionable direction by the lender.

Additionally, we also seek clarification that, during reconstruction of a home that was damaged, the lender may require the borrower to maintain the last known amount of flood insurance throughout the reconstruction process.

VI. Clarification is requested on the necessary level of flood insurance with respect to subordinate lien loans

The proposed Answer to **Question 32** states that a lender making a second mortgage loan must consider the combined total outstanding principal balance of the first and second loan when determining whether "adequate flood insurance" is in place to cover its interests. This approach, however, is not feasible as lenders of a second loan generally do not receive notification that the first loan (when made by a non-affiliated lender) has been paid in full or has been decreased.

The Agencies should clarify that a lender of a second loan may, when calculating the combined total outstanding principal balance of the first and second loan, assume that the first loan amount is current. Alternatively, the Agencies should clarify that a lender of a second loan complies with the Act and Regulation by requiring flood insurance at the lesser of the maximum limit available or the last known hazard insurance amount. As stated above, the amount of hazard insurance maintained on the property is generally the most up-to-date information available regarding the "insurable value" of the property, and represents an amount that was agreed upon by the borrower, and the borrower's agent and insurer. This alternative approach is consistent with the Regulation which requires only a minimum amount of flood insurance; as indicated in the proposed answer to **Question 13**, a lender is permitted to require more coverage than the minimum required.

VII. The "same lender" exception for home equity loans should also apply to a lender's affiliates

The proposed answer to **Question 33** states that if a lender, other than the one that made the first mortgage loan, is making the home equity loan, then the second lender would be required to make a new flood determination. The lender of the home equity loan would have no such requirement, however, if it was the "same lender" which made the first mortgage loan.

This exception should extend to situations when the first and second lenders are affiliates at the time the second loan is made. The Agencies should clarify that if the lender of the home equity loan is an affiliate of the lender of the first mortgage loan at the time the home equity loan is closed, then the lender of the home equity loan would not be required to make a new determination if the existing determination is not more than seven years old, there have been no new map changes, and the existing determination was recorded on a Special Flood Hazard Determination Form. Additionally, if the first mortgage includes a life-of-loan tracking/determination contract, a new determination would not be required.

VIII. Clarification is sought on the appropriate level of borrower deductibles

Proposed new **Question 14** would address lender considerations regarding the amount of the deductible amount on a flood insurance policy purchased by a borrower.

Generally, the guidance advises a lender to determine the reasonableness of the deductible on a case-by-case basis, taking into account the risk that such a deductible would pose to the borrower and lender.

The revised comment on deductibles indicates that it is acceptable to allow the borrower to use the maximum deductible, but that doing so may not be a sound business decision in all cases. The answer seems to imply that allowing the maximum deductible in all cases may be compliant with the mandatory purchase rules, but that doing so may subject a lender to a finding that they are operating in an unsound manner.

We would seek clarification on the intent of this Answer and on how it will be enforced. The proposed Answer could be viewed as an attempt to impose a new requirement that the determination of a reasonable deductible amount must be made individually on all loans -- potentially an unreasonable approach for a large lender – and that a policy that simply requires that a borrower not exceed the maximum deductible allowed is insufficient to comply with the requirements, as it would be deemed an unsound practice.

Since only one example of an unreasonable deductible amount is included in the Answer, and since, other than in that case, we have not had any reason heretofore to contemplate other circumstances where the maximum deductible would be unreasonable, we would seek further guidance on this topic. The guidance should address both whether the standard created by this Answer is intended to impose an additional requirement on lenders that must be documented, on a loan-by-loan basis, as well as the specific criteria that should be used to determine the reasonableness of a deductible. Otherwise, this would appear to open the door to an inefficient and unworkable standard, and will create situations where the lender could be second guessed and cited by a regulator for failing to impose reasonable deductible limits without having had the benefit of any firm guidance.

We suggest a clarification that this Answer is only designed to make lenders aware that there may be circumstances where the maximum deductibles may not afford them the highest level of protection that may be warranted. In addition, we suggest including within the Answer that the regulator will provide a level of deference to the lender's use of the maximum deductible amounts that have been established and used, but that if a regulator arrives at a different finding, that would not constitute a violation of the Act.

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Bank of America appreciates the opportunity to comment on the Agencies' proposed Questions and Answers, and we thank you for your consideration of these comments.

Respectfully Submitted,

Robert Caruso
Senior Vice President

Bank of America, NC1-014-12-33
200 South College Street, Charlotte, NC 28255

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