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Rate Hikes and Litigation: Changes to Federal Flood Insurance Program

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Changes to the federal flood insurance program in March attempted to address deep concerns about skyrocketing rates for those in flood-prone areas covered by the National Flood Insurance Program (NFIP), but upcoming deadlines implementing these changes raise the specter of litigation.

The National Flood Insurance Program

Reacting to failures of the private insurance industry to provide coverage for flooding beginning in the 1960s, Congress established the NFIP through Title XIII of the Housing and Urban Development Act of 1968 to alleviate “personal hardships and economic distress” through “sharing the risk of flood losses” and “encourag[ing] preventive and protective measures.” The NFIP was designed to provide “previously unavailable flood insurance protection to property owners in flood-prone areas” because it was “uneconomic for the private insurance industry alone to make flood insurance available to those in need of such protection on reasonable terms and conditions.”

The NFIP was designed to provide a federal insurance scheme to communities in flood-prone areas that adopted and enforced floodplain management ordinances to reduce future flood risks to new construction in designated special flood hazard areas, which were designated, along with other risk premium zones, on flood insurance rate maps. Congress empowered the Federal Emergency Management Agency (FEMA) to serve as the NFIP’s administrator.

In enacting the NFIP, Congress acknowledged that the program might need to be refined and expanded gradually “as knowledge is gained and experience is appraised.”

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The Biggert-Waters Flood Insurance Reform Act of 2012

The NFIP was supposed to be self-funding, with its operating expenses and flood insurance claims paid for through the premiums collected for flood insurance policies. However, facing repeated deficits and large payouts as a result of natural disasters, Congress reformed the NFIP in 2012 through the Biggert-Waters Flood Insurance Reform Act of 2012 (commonly referred to as the "BW-12"), Pub. L. No. 112-141, extending the NFIP through 2017 and targeting the rates charged under the program. According to FEMA, the BW-12 was "designed to make the NFIP more financially stable, and [to] ensure that flood insurance rates more accurately reflect the real risk of flooding." FEMA, [Questions about the Biggert-Waters Flood Insurance Reform Act of 2012](#). The BW-12 sought to address a flaw in the NFIP, in that when a home or business with flood insurance was damaged, owners of existing homes and businesses did not have to rebuild to newer, more flood-resistant building standards but received flood insurance rates that were designed for these new, more flood-resistant standards. As a result, "many received subsidized rates that did not reflect their true risk." *Id.* The BW-12 sought to correct this by allowing premiums to rise to reflect the true risk of living in high-flood areas.

Under the NFIP, approximately 20 percent of all policies had subsidized rates. The BW-12 increased premiums by phasing out subsidies for businesses, properties of one to four residences that have experienced severe repetitive loss, and properties that had incurred flood-related damages where claims payments exceeded the fair market value of the property. Premiums were to be increased by 25 percent per year until actuarial risk was achieved. While subsidies were not phased out for primary residences entirely, they were discontinued with respect to "newly purchased properties, lapsed policies, [and] new policies covering properties for the first time." *Id.* Finally, the BW-12 also extended the NFIP's effectiveness for five additional years through September 30, 2017.

The Homeowner Flood Insurance Affordability Act of 2014

Although the BW-12 contemplated higher premiums, the increases were unprecedented and unanticipated and became a lightning rod of criticism. According to House Republicans, "[t]he economic implications of flood insurance" as a result of the act "is devastating home values, small businesses, and entire communities around the country." [H.R. 3370](#), 113th Cong. (2d Sess. 2014). The Homeowner Flood Insurance Affordability Act of 2014 (HFIAA), [Pub. L. No. 113-89](#) (Mar. 21, 2014), was written and passed to remedy some of the BW-12's shortfalls. The HFIAA was bipartisan (see [U.S. Senate roll call vote](#), Mar. 13, 2014) and [supported](#) by the National Association of Realtors, American

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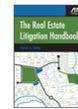
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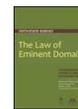
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Bankers Association, National Association of Federal Credit Unions, Independent Community Bankers of America, National Association of Home Builders, National Association of Counties, and the Coalition for Sustainable Flood Insurance, among other groups.

The HFIAA reinstates many of the subsidies that were repealed under the BW-12. Nonetheless, the Congressional Budget Office “estimates that the surcharges collected under the bill” would offset “lesser premium collected from some properties” resulting in “no significant effect on net income to the NFIP over the 2015-2024 period.” Some of the HFIAA’s notable features include:

1. Limitation of premium increases under the NFIP, with limited exceptions, to no more than 18 percent annually as opposed to 25 percent under the BW-12. HFIAA § 5(5).
2. Coverage under the seller’s prior NFIP-subsidized premium rate for homeowners who purchased their homes after July 6, 2012. HFIAA § 3(a)(1)(A) (striking 42 U.S.C. § 4014(g)(2)). The BW-12 had not allowed subsidized rates to be passed from seller to purchaser.
3. Restoration of subsidized rates for properties not insured by the flood insurance program as of July 6, 2012. HFIAA § 3(a)(1)(A) (striking 42 U.S.C. § 4014(g)(1)).
4. The requirement that FEMA notify communities and members of Congress of remapping as well as models used in the mapping process. HFIAA § 30(3)(A) (amending 42 U.S.C. § 4101b(d)(1) to add new subparagraph (A)).
5. Renewal of the availability of subsidized rates, previously applicable prior to the BW-12, for structures that were built before a community’s floodplain regulations were first instituted pursuant to the NFIP, and repeal of the BW-12’s true actuarial rates for these structures that were being phased in over five years at a rate of 20 percent per year. HFIAA § 4(a)(1) (striking 42 U.S.C. § 4015(h)).
6. Repeal of the section of the BW-12 that required property owners mapped into higher risk either to elevate their structure or to have higher rates phased in over five years. HFIAA § 4(a)(1) (striking 42 U.S.C. § 4015(h)).
7. The requirement that FEMA refund policyholders

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who are deemed to have overpaid as a result of the BW-12, which determination will be made based on rate tables published by FEMA. HFIAA § 3(a)(4).

8. Establishment of a Flood Insurance Advocate within FEMA to conduct outreach and education and answer current and prospective policyholder questions about the flood mapping process and flood insurance rates. HFIAA § 24.

9. The requirement that FEMA establish guidelines on alternative mitigation methods for urban structures where traditional mitigation efforts such as elevation are impractical due to either the type of building materials or the type of flood proofing. HFIAA § 26(a) (1) (amending 42 U.S.C. § 4102 to add new subparagraph (d) with guidelines to be available by March 21, 2015).

10. The requirement that FEMA, at least five months prior to the implementation of rate increases as a result of the HFIAA, make the rate increases and underwriting guidelines publicly available to provide consumers with greater transparency. HFIAA § 31(a).

The HFIAA provides until November 21, 2014, for FEMA to issue final guidance and rate tables necessary to implement these changes to the NFIP. HFIAA § 3(a)(3)(B).

Flood Insurance Litigation

It is unclear what ramifications, beyond political fallout, exist for FEMA's failure to act pursuant to the direction of the HFIAA with respect to the issues of final guidance and rate tables in November. No cause of action exists "against the United States for violation of any notification requirement" of the NFIP. 42 U.S.C. § 4130. However, suits may be brought against the federal government as underwriter for a breach of a standard flood insurance policy. 44 C.F.R. pt. 61. Additionally, lawsuits can be and are brought against "participating property and casualty insurance companies [who] write and service standard flood insurance policies" in their own name as "fiscal agent[s] of the Federal Government." 42 U.S.C. § 4004(a)(5). Suits brought against the government name FEMA, the Administrator of FEMA, and the Secretary of the U.S. Department of Homeland Security (which oversees FEMA) as defendants and suits brought against private insurers name the insurance company as the defendant. Both types of lawsuits are subject to a one-year statute of limitation. 44 C.F.R. § 62.22(a).

As an alternative to litigation, policyholders may seek an

administrative appeal if the dispute is “with respect to a claim, proof of loss, and loss estimate” against either a private insurer or the federal government. 44 C.F.R. § 62.20. These administrative appeals do not toll the statute of limitations for suit, 44 C.F.R. § 62.20(f)(4), and are precluded if litigation has been previously filed with respect to the same claim. 44 C.F.R. § 62.20(d). The procedural rules for such administrative appeals are promulgated by FEMA. 44 C.F.R. § 59–80. See FEMA, *National Flood Insurance Program Regulations*, FEMA F-775, June 2009.

Additionally, FEMA regulations allow “[a]ny owner or lessee of real property ... where a proposed flood elevation determination has been made ... who believes his property rights to be adversely affected ... [to] appeal.” 44 C.F.R. § 67.5. Further, the regulation provides a private right of action in district court, with a 60-day statute of limitations, by an “appellant aggrieved by the final determination.” 44 C.F.R. § 67.12(a). To make it easier for property owners to bring such initial appeals, the HFIAA establishes a Flood Insurance Advocate, whose charge includes assisting policyholders and property owners to “understand the procedural requirements related to appealing preliminary flood insurance rate maps and implementing measures to mitigate evolving flood risks.” HFIAA § 24(b)(2). Because of this advocate, attorneys may no longer play a significant role in initial appeals and may only have a role in appeals of final agency determinations.

Conclusion

Because many of the provisions of the HFIAA charge FEMA with implementation and the same are yet to be accomplished, it is too soon to evaluate whether the HFIAA remedies the BW-12’s shortfalls and what the final impact will be on flood insurance litigation.

Keywords: real estate litigation, National Flood Insurance Program, FEMA, Homeowner Flood Insurance Affordability Act of 2014, Flood Insurance Advocate, Biggert-Waters Flood Insurance Reform Act of 2012

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