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U.S. Senate Considers Mandatory Flood Insurance Even for Properties Protected by Accredited Flood-Control Structures

The U.S. Senate is considering the long-term reauthorization for the National Flood Insurance Program, which, if enacted in its present form, would require mandatory participation in the insurance program for areas of “residual risk, including areas protected behind levees, dams and other flood-control structures.” The requirement will affect communities and property owners protected by these flood-control measures by (i) identifying the property as an area of “residual risk” on a flood rate insurance map, (ii) requiring the owners to purchase flood insurance against the potential failure of the flood-control structure in order to receive federal financial assistance or loans from federally insured financial institutions, and (iii) subjecting the property to flood plain development restrictions. The proposed law will also affect federally insured financial institutions that will need to review loan portfolios, underwriting standards and notice procedures to ensure compliance with applicable federal regulations.

The National Flood Insurance Program

The National Flood Insurance Program (NFIP) was created by Congress in 1968 to provide a means for property owners to financially protect themselves from the risk of catastrophic floods. The NFIP offers flood insurance to homeowners, renters and business owners located within areas subject to a “base flood” (i.e., a 100-year flood event or a 1 percent chance of a flood) if their communities participate in the NFIP. Participating communities agree to adopt and enforce land-use control ordinances that restrict development within areas designated as “special flood hazard areas” (SFHA) according flood

insurance rate maps (FIRMs) published by the Federal Emergency Management Agency (FEMA).

Under 42 U.S.C. § 4012a, federal agencies are prohibited from approving financial assistance for “acquisition or construction purposes” in any area that is located within a SFHA. Notably, pursuant to 12 CFR Part 22 (national banks), 12 CFR Part 339 (state banks), 12 CFR Part 572 (savings associations) and 12 CFR Part 760 (credit unions), a federally insured financial institution cannot make, increase, extend or renew a loan secured by property located within a SFHA unless the property is covered by flood insurance for the term of the loan. Although these regulations only apply to federally insured financial institutions, many non-federally insured financial institutions elect to impose the same or similar flood insurance requirements through their underwriting standards.

FEMA is responsible for administering the NFIP and regularly revises FIRMs for flood-prone areas. Under current law, if FEMA finds that a flood-control structure meets the certification standards set forth under 44 CFR § 65.10, the area protected by the flood-control structure is not identified as within a 100-year flood plain, and property owners protected by the flood-control structure are not required to purchase flood insurance. This and other public safety reasons have prompted communities in 881 counties in the United States to construct, operate, and maintain, substantially at their own expense, flood-control structures that protect more than 50 percent of the nation’s population.

Mandatory Coverage Requirement

On September 8, 2011, the U.S. Senate Committee on Banking, Housing and Urban Affairs approved Senate Bill 1940 to reauthorize the NFIP. The bill includes a requirement that “areas of residual risk, including areas protected behind levees, dams, and other flood-control structures” be identified on FIRMs and subject to mandatory participation in the NFIP. The legislation dovetails with FEMA’s recent administrative efforts to adopt a set of mapping procedures to replace the “without levee analysis” previously used to map acres protected by unaccredited flood-control structures. Such procedures could be applied to map the potential failure of a flood-control structure in “areas of residual risk.” The new mandate increases the number of ratepayers for flood insurance pools, which thereby decreases the U.S. government’s exposure to losses it incurs from flood insurance claims under the NFIP. FEMA currently owes \$18 billion to the U.S. Treasury from insurance claims associated with Hurricanes Katrina and Rita and the 2008 and 2011 flood seasons.

The effect on property owners protected by accredited flood-control structures may be significant. In order to receive a loan from a federally insured financial institution and participate in certain federal programs, property owners whose property is located in an “area of residual risk” will be required to (a) purchase flood insurance at an actuarial rate that accounts for losses associated with the potential failure of an accredited flood-control structure and (b) comply with land-use restrictions that communities must adopt in order to participate in the NFIP. Fortunately, Section 107 only affects

FIRMs currently under development and future FIRMs. Effective FIRMs will not be re-evaluated under the new law absent the initiation of a map revision by FEMA, an affected community or property owner.

The hardest hit communities will be metropolitan areas such as Dallas, Memphis, Omaha, New Orleans, St. Louis and other cities located near major U.S. rivers and waterways that have invested in flood-control structures to protect their residents and promote economic development. Small agricultural communities that rely on FEMA certified levee systems to protect their residences, businesses and crops along major and minor river systems will also be affected. Moreover, given research indicating that flood plains across the country are expected to increase by up to 45 percent over the next 90 years, many more communities that previously did not participate in the NFIP may eventually be affected by this proposed legislation.

The new requirement will also affect federally insured financial institutions. These institutions will need to review existing loan portfolios to determine if their borrowers are now required to carrying flood insurance as well as underwriting standards and flood insurance notice policies to ensure compliance with the new law and applicable federal regulations.

Flood Insurance Extension Expires July 31

Congress passed and President Barack Obama signed several extensions to the current authorizing legislation for the NFIP, the most recent of which extend FEMA's authority to issue new flood insurance contracts through July 31, 2012 (H.R. 5740). As of June 13, 2012, the bill appeared on the Senate's agenda and debate is expected to begin the week of June 18, 2012. The House adopted its version of the reauthorization (H.R. 1309) on July 12, 2011, which does not contain a similar provision.

A coalition of flood-control groups has led an initiative to request that the Senate strike the mandate from the current legislation, but it is clear that few senators fully understand its implications. Husch Blackwell is working with local levee districts and municipalities across the Midwest to educate senators about the effects this legislation will have on urban and rural communities, and we encourage you to contact your senator to express your opinion. Sen. Mark Pryor, a Democrat from Arkansas, says he will offer an amendment to the current bill to strike the provision if it is not removed before debate on Senate Bill 1940 begins.

What This Means to You

For property owners, Senate Bill 1940 will require FEMA to identify property protected by an accredited flood-control structure as an area of "residual risk" on new FIRMs, mandate that owners

purchase flood insurance against the potential failure of the flood-control structure, and subject the property to applicable floodplain land-use ordinances imposed by a local government.

For communities participating in the NFIP and flood-control operators and owners, Senate Bill 1940 will require communities to educate residents and businesses about the new insurance requirements and vigilantly work with FEMA during a re-mapping project to ensure that the “areas of residual risk” are appropriately drawn on FIRMs for areas protected by flood-control structures.

For federally insured financial institutions, Senate Bill 1940 will require institutions to review existing loan portfolios and underwriting standards to determine if current flood insurance practices and notice requirements comply with the proposed law and applicable federal regulations.

Contact Info

For additional information and assistance, please contact your Husch Blackwell attorney or David Human at 314.480.1710.

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