

(Authority: 10 U.S.C. 1174(h)(2))

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William F. Russo,

Director of Regulations Management.

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DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 62

[Docket ID FEMA-2008-0001]

RIN 1660-AA58

National Flood Insurance Program (NFIP); Assistance to Private Sector Property Insurers; Write-Your-Own Arrangement

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final rule.

SUMMARY: This rule adopts as final, without change, an interim rule published on April 3, 2008. The interim rule amended portions of the Federal Emergency Management Agency, Federal Insurance Administration, Financial Assistance/Subsidy Arrangement between Write-Your-Own Companies and FEMA. The added language assisted WYO Companies by recognizing each party's duties under the Arrangement and amended the way FEMA communicates changes to the Unallocated Loss Adjustment Expenses compensation rate to WYO Companies.

DATES: This rule is effective August 24, 2009.

FOR FURTHER INFORMATION CONTACT:

Edward L. Connor, Acting Federal Insurance Administrator, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646-3429 (Phone), (202) 646-3445 (facsimile), or Edward.Connor@dhs.gov.

SUPPLEMENTARY INFORMATION:

I. Background

Under the authority of sections 1304 and 1345 of the National Flood Insurance Act of 1968, Public Law 90-448, 82 Stat. 476, as amended (42 U.S.C. 4011, 4081), the Federal Emergency Management Agency (FEMA) provides insurance protection against flood damage to homeowners, businesses, and others by means of the National Flood Insurance Program (NFIP). The sale of flood insurance is largely implemented by private insurance companies that participate in the NFIP Write-Your-Own

(WYO) program. Through the WYO program, insurance companies enter into agreements with FEMA to sell and service flood insurance policies and adjust claims after flood losses.

Under the WYO program, 88 private sector property insurers issue flood insurance policies and adjust flood insurance claims under their own names based on the Financial Assistance/Subsidy Arrangement (Arrangement). The Arrangement is published at 44 CFR part 62, Appendix A and defines the duties and responsibilities of insurers that sell, service, and market insurance under the WYO program. The Arrangement also identifies the responsibilities of the Government to provide financial and technical assistance to these insurers. The Arrangement is renewed yearly through written agreement between the WYO Companies and FEMA.

FEMA published an interim final rule on April 3, 2008, (73 FR 18182) in which it made three changes to the Arrangement. These changes either clarified existing practices or clarified how FEMA communicates certain information to WYO Companies.

First, Article II, section G.3., was added to require the WYO Companies to notify their agents of the requirement to comply with State regulations regarding flood insurance agent education, notify them of flood insurance training opportunities needed to meet the minimum NFIP training requirements called for in section 207 of the Bunning-Bereuter-Blumenauer Flood Insurance Reform Act of 2004, Public Law 108-264, 118 Stat. 727 (42 U.S.C. 4011 note), and assist FEMA in periodic assessment of agent training needs. Although WYO Companies were already undertaking these efforts, they were added to the Arrangement to formalize the commitment.

Second, FEMA revised Article VII, section A. to provide additional clarification that there is no requirement that WYO Companies use their own funds to pay NFIP claims when there are no funds available in the National Flood Insurance Fund (NFIF) to be drawn down through the company letter of credit. In such circumstances, the Federal Insurance Administrator would suspend the NFIF's payment of claims until funds are again available in the Treasury, and the WYO Companies would not be required to pay claims from their own funds in the event of such a suspension. This change was consistent with pre-existing FEMA policy.

Finally, FEMA revised Article III, section C.1. of the Arrangement which deals with the Unallocated Loss

Adjustment Expense (ULAE) for which WYO Companies receive reimbursement under the Arrangement. ULAE is intended to cover those claim handling expenses that are not associated with specific claims, such as maintaining the home office claims staff and establishing and running on-site claims field offices. Before the interim final rule, the ULAE rate was an expense reimbursement of 3.3 percent of the incurred loss (except that it does not include "incurred but not reported"). The effect of the interim final rule was to remove the ULAE compensation percentage from the Arrangement. Instead, the percentage is now communicated by FEMA to the WYO Companies through a formula that is not written into the Arrangement. For fiscal year 2009, the formula was sent to each WYO Company as part of their offer to renew their Financial Assistance/Subsidy Arrangement.

Although the interim final rule was focused on the manner in which the ULAE formula is communicated to the WYO Companies, and not the actual ULAE rate itself, FEMA sought data to use in its efforts to revise the formula, and suggestions for ways to tailor the formula to ensure that it would accurately reimburse WYO Companies for their actual loss. WYO Companies were encouraged to submit actual ULAE data during the comment period of the interim final rule to assist FEMA in continuing to refine the formula.

II. Discussion of Public Comments

FEMA received no comments from the public regarding the interim final rule. All previously published rulemaking documents, including the interim final rule which contains an in-depth explanation for the changes made, and supporting data are available in the public docket for this rulemaking. The public docket for this rulemaking is available online by conducting a search for Docket ID FEMA-2008-0001, at the Federal e-Rulemaking Portal at <http://www.regulations.gov>.

III. Regulatory Requirements

Congressional Review of Agency Rulemaking

FEMA has sent this final rule to the Congress and to the Government Accountability Office under the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801-808. As discussed in depth below in the Executive Order 12866 analysis, this rule is not a "major rule" within the meaning of that Act and will not result in an annual effect on the economy of \$100,000,000 or more. Moreover, it will not result in a major increase in costs or

prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. Nor does FEMA expect that it will have “significant adverse effects” on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises.

This rule revised the Arrangement between the WYO Companies and FEMA to encourage agents writing flood insurance under the NFIP to avail themselves of the training opportunities needed to meet the minimum NFIP training requirements, to clarify that there is no requirement that WYO Companies use their own funds to pay NFIP claims when there are no funds available in the NFIP to be drawn down through the company letter of credit, and to change the method in which FEMA communicates the ULAE rate to the WYO Companies. These changes were made to improve the Arrangement and to allow FEMA to run the NFIP in a more efficient and reasonable manner.

Executive Order 12866, Regulatory Planning and Review

FEMA has prepared and reviewed this rule under the provisions of Executive Order 12866, Regulatory Planning and Review. Under Executive Order 12866, a significant regulatory action is subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Executive Order defines “significant regulatory action” as one that is likely to result in a rule that may:

- (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees,

or loan programs or the rights and obligations of recipients thereof; or
 (4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order.

This final rule is not a “significant regulatory action”, therefore OMB has not reviewed it under that Order. This rule adopts as final, without change, an interim rule published on April 3, 2008. The interim rule made three changes to the Arrangement. The first change simply clarifies existing practices. Article II, section G.3., was added to address the WYO Companies’ cooperation in helping ensure that agents writing flood insurance under the NFIP meet the minimum NFIP training requirements.¹ This new section of the Arrangement will not affect the training and education requirements, which are already established by the States. Although WYO Companies are already undertaking these efforts, they were added to the Arrangement to formalize the commitment. This change will have no economic impact.

WYO Companies have sought clarification as to what would occur following a large scale flooding event if there are no funds available in the NFIP to be drawn down through the company letter of credit. Therefore, the second change clarifies that there is no requirement that WYO Companies use their own funds to pay NFIP claims when there are no funds available in the NFIP to be drawn down through the company letter of credit. The Federal Insurance Administrator will suspend the NFIP’s payment of claims until funds are again available in the Treasury. This change is consistent with pre-existing FEMA policy, will not affect the amount of FEMA’s funding, and will have no economic impact.

Finally, FEMA revised Article III, section C.1. of the Arrangement which deals with the ULAE for which WYO Companies receive reimbursement under the Arrangement. The rule removed the fixed 3.3 percent of ULAE compensation from the Arrangement to allow FEMA added flexibility in

adjusting the rate as needed to best align with the actual expenses incurred by the WYO Companies. At present, the ULAE is reimbursed according to a revised formula of 1 percent of net written premium and 1.5 percent of incurred loss. FEMA will adjust the rate as needed to reflect the actual expenses incurred by the WYO Companies on an annual basis.

Table 1 below shows the historic ULAE compensation that the program paid to WYO Companies over the 21 years from 1987 to 2007. These figures have been compiled using historic accounting statements submitted by the WYO Companies. The ULAE is intended to cover those claim handling expenses that are not associated with specific claims, such as maintaining the home office claims staff and establishing and running on-site claims field offices. The 3.3 percent rate functioned equitably during most years of the NFIP, under-compensating companies moderately in light loss years, while providing slightly more compensation in heavier loss years. However, after catastrophic disasters such as Hurricane Katrina, FEMA found that the 3.3 percent fixed rate dramatically over compensated WYO Companies.

The average annual impact of this rule is estimated to be \$13.93 million per year (in 2007 \$), which represents a decrease in the ULAE compensation to WYO Companies. However, in an “average” loss year excluding the years 2005 and 2006 for Hurricane Katrina, the NFIP has paid out approximately \$22.02 million per year in ULAE (= \$418,468,366/19). With the new formula, the annual impact would result in an increase in ULAE compensation to WYO Companies of \$605,210 per year (in 2007 \$). The annual impact will vary as the rate will be adjusted annually to reflect the actual expenses incurred by the WYO Companies; however, it is not likely to have a significant economic impact of \$100 million or more per year. The data from 1987 to 2007 used to generate these figures is available in the public docket for this rulemaking.

TABLE 1—THE IMPACT OF THE NEW FEE SCHEDULE

FY	Net written premium (WP) (in 2007 \$) ²	Incurred loss (IL) (in 2007 \$)	Fixed ULAE (3.3% of incurred loss) (in 2007 \$)	New ULAE fee schedule (1% of WP + 1.5% of IL) (in 2007 \$)	New ULAE fee schedule less fixed ULAE (in 2007 \$)
1987	\$581,620,328	\$74,573,109	\$2,460,913	\$6,934,800	\$4,473,887
1988	645,173,008	65,777,062	2,170,643	7,438,386	5,267,743
1989	715,237,333	369,480,867	12,192,869	12,694,586	501,718

¹ An NFIP insurance agent may satisfy the minimum training and education requirements by

completing an online course, which may be

approved for 3 hours of continuing education credit per year by State.

TABLE 1—THE IMPACT OF THE NEW FEE SCHEDULE—Continued

FY	Net written premium (WP) (in 2007 \$) ²	Incurred loss (IL) (in 2007 \$)	Fixed ULAE (3.3% of incurred loss) (in 2007 \$)	New ULAE fee schedule (1% of WP + 1.5% of IL) (in 2007 \$)	New ULAE fee schedule less fixed ULAE (in 2007 \$)
1990	769,271,356	685,763,329	22,630,190	17,979,164	-4,651,026
1991	780,514,853	206,603,224	6,817,906	10,904,197	4,086,290
1992	796,262,026	473,136,630	15,613,509	15,059,670	-553,839
1993	866,436,821	1,097,485,315	36,217,015	25,126,648	-11,090,367
1994	932,647,295	270,791,261	8,936,112	13,388,342	4,452,230
1995	1,041,750,604	1,314,742,022	43,386,487	30,138,636	-13,247,850
1996	1,157,008,118	1,152,337,444	38,027,136	28,855,143	-9,171,993
1997	1,294,209,933	885,147,617	29,209,871	26,219,314	-2,990,558
1998	1,500,206,671	522,197,486	17,232,517	22,835,029	5,602,512
1999	1,528,655,735	909,405,646	30,010,386	28,927,642	-1,082,744
2000	1,557,194,095	514,278,754	16,971,199	23,286,122	6,314,923
2001	1,678,554,108	1,495,645,122	49,356,289	39,220,218	-10,136,071
2002	1,796,558,215	276,916,036	9,138,229	22,119,323	12,981,093
2003	1,853,315,163	559,297,309	18,456,811	26,922,611	8,465,800
2004	1,945,458,730	1,014,727,339	33,486,002	34,675,497	1,189,495
2005	2,060,079,530	7,612,410,664	251,209,552	134,786,955	-116,422,597
2006	2,353,434,684	11,730,924,332	387,120,503	199,498,212	-187,622,291
2007	2,535,371,429	792,553,990	26,154,282	37,242,024	11,087,742
Total	28,388,960,039	32,024,194,560	1,056,798,420	764,252,519	-292,545,902
Per Year	1,351,855,240	1,524,961,646	50,323,734	36,392,977	-13,930,757

National Environmental Policy Act

FEMA's regulations implementing the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) at paragraph (ii) of 44 CFR 10.8(d)(2) categorically exclude the preparation, revision, and adoption of regulations, directives, manuals, and other guidance documents related to actions that qualify for categorical exclusions. The changes made in this regulation constitute actions to enforce Federal, State or local codes, standards or regulations. This rulemaking will not have a significant effect on the human environment and, therefore, neither an environmental assessment nor an environmental impact statement are required.

Executive Order 13132, Federalism

Executive Order 13132, entitled "Federalism," (64 FR 43255, Aug. 10, 1999), sets forth principles and criteria that agencies must adhere to in formulating and implementing policies that have federalism implications; that is, regulations that have substantial direct effects on the States, or on the distribution of power and responsibilities among the various levels of government. Federal agencies must closely examine the statutory

authority supporting any action that would limit the policymaking discretion of the States, and to the extent practicable, must consult with State and local officials before implementing any such action. The changes in this rule affect the contractual relationship between FEMA and WYO Companies. Participation as a WYO Company is voluntary and does not affect State policymaking discretion. In accordance with section 6 of Executive Order 13132, FEMA determines that this rule will not have federalism implications sufficient to warrant the preparation of a federalism impact statement.

Paperwork Reduction Act of 1995

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. This rule does not impose any new reporting or recordkeeping requirements, nor does it revise information collection requirements currently approved under the Paperwork Reduction Act of 1995.

Executive Order 12988, Civil Justice Reform

FEMA has reviewed this rule under Executive Order 12988, "Civil Justice Reform" (61 FR 4729, Feb. 7, 1996). This rule meets applicable standards to

minimize litigation, eliminate ambiguity, and reduce burden.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies, to the extent permitted by law, to prepare a written assessment of the effects of any Federal mandate in a proposed or final agency rule that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. Though this rule will not result in such an expenditure, FEMA does discuss the effects of this rule elsewhere in this preamble.

Moreover, because this rule addresses a pre-existing Arrangement between FEMA, Federal Insurance Administration, and WYO Companies it does not impose any additional enforceable duty beyond that already established. Participation as a WYO Company is voluntary and does not affect State policymaking discretion. Accordingly, this rule does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995.

Executive Order 12898, Environmental Justice

Under Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income

²Numbers were adjusted for inflation based on Consumer Price Index (CPI) published by the Bureau of Labor Statistics, http://inflationdata.com/inflation/Inflation_Rate/HistoricalInflation.aspx.

Populations" (59 FR 7629, Feb. 16, 1994), FEMA incorporates environmental justice into its policies and programs. The Executive Order requires each Federal agency to conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensures that those programs, policies, and activities do not have the effect of excluding persons from participation in programs, denying persons the benefits of programs, or subjecting persons to discrimination because of race, color, or national origin. FEMA believes that no action under this rule will have a disproportionately high or adverse effect on human health or the environment, and that the rule meets the requirements of the Executive Order.

Executive Order 13045, Protection of Children

FEMA has analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and would not create an environmental risk to health or safety that might disproportionately affect children.

Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

FEMA has reviewed this rule under Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, Nov. 9, 2000). This rule will not have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

Executive Order 12630, Governmental Actions and Interference With Constitutionally Protected Property Rights

FEMA has reviewed this rule under Executive Order 12630, "Governmental Actions and Interference with Constitutionally Protected Property Rights" (53 FR 8859, Mar. 18, 1988) as supplemented by Executive Order 13406, "Protecting the Property Rights of the American People" (71 FR 36973, June 28, 2006). This rule will not effect a taking of private property or otherwise have taking implications under Executive Order 12630.

List of Subjects in 44 CFR Part 62

Claims, Flood insurance, Reporting and recordkeeping requirements.

■ Accordingly, the interim rule amending 44 CFR part 62 which was

published at 73 FR 18182, Apr. 3, 2008, is adopted as final without change.

Dated: July 16, 2009.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

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DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Parts 356, 365, and 374

[Docket No. FMCSA-2008-0235]

RIN 2126-AB16

Elimination of Route Designation Requirement for Motor Carriers Transporting Passengers Over Regular Routes

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of disposition.

SUMMARY: On March 17, 2009, FMCSA published a notice in the **Federal Register** (74 FR 11318) extending the effective date of its January 16, 2009 final rule entitled "Elimination of Route Designation Requirement for Motor Carriers Transporting Passengers Over Regular Routes" until June 15, 2009. This allowed for the solicitation of additional public comments on the final rule and gave the incoming Administration sufficient time to consider and respond to comments. After reviewing the one comment that was received, FMCSA decided to allow the January 19, 2009 final rule to go into effect. This notice addresses the comment that was submitted.

DATES: The effective date for the rule amending 49 CFR Parts 356, 365, and 374 published at 74 FR 2895 on January 16, 2009, was June 15, 2009. The compliance date for this rule was July 15, 2009.

FOR FURTHER INFORMATION CONTACT: Mr. David Miller, Regulatory Development Division, (202) 366-5370 or by e-mail at: FMCSAregs@dot.gov.

SUPPLEMENTARY INFORMATION:

On January 16, 2009, FMCSA published a final rule announcing the discontinuation of the administrative requirement that applicants seeking for-hire authority to transport passengers over regular routes submit a detailed description and a map of the route(s) over which they propose to operate (74 FR 2895). The Agency indicated that it will register such carriers as regular-

route carriers without requiring the designation of specific regular routes and fixed end-points. Once motor carriers have obtained regular-route, for-hire operating authority from FMCSA, they will no longer need to seek additional FMCSA approval in order to change or add routes. The rule amended certain provisions of 49 CFR Parts 356, 365 and 374 to make them consistent with the Agency's discontinuation of the route designation requirement. Each registered regular-route motor carrier of passengers will continue to be subject to the full safety oversight and enforcement programs of FMCSA and its State and local partners.

The effective date of the rule was originally March 17, 2009, with a compliance date of July 15, 2009. In accordance with the January 20, 2009 memorandum from the Assistant to the President and Chief of Staff (74 FR 4435), FMCSA published a notice on March 3, 2009 seeking comment on a proposal to delay the effective date of the final rule for 90 days (74 FR 9172).

Based on comments submitted in response to the March 3 notice, FMCSA extended the effective date of the final rule from March 17, 2009, to June 15, 2009, for the purpose of allowing the new leadership of the Department of Transportation to review the proceeding and to seek additional public comment (74 FR 11318, March 17, 2009).

Comments to the March Notice

Greyhound Lines, Inc. (Greyhound) submitted the only comment to the March 17 notice. Greyhound expressed concern that the Agency's proposal would prevent meaningful implementation of the Over-The-Road Bus Transportation Accessibility Act of 2007, Public Law 110-291, 122 Stat. 2915, July 30, 2008 because, without route designations, FMCSA would be unable to assess whether an applicant for new operating authority has adequate equipment and systems to comply with the Americans with Disabilities Act (ADA). Moreover, eliminating the need for existing carriers to seek new authority before expanding their operations would eliminate FMCSA's ability to assess ADA compliance before allowing route expansion.

Greyhound also took issue with the Agency's statement, in the preamble to the final rule, that FMCSA and its predecessor agencies have not used route designations in determining whether an applicant could operate safely over a specific route, but provided no cases to support its position. Greyhound reiterated arguments, made previously in this