

January 4, 2017

Mr. Gerard S. Poliquin
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314

Re: Loans in Areas Having Special Flood Hazards—Private Flood Insurance;
RIN 3133–AE64

Dear Mr. Poliquin:

On behalf of America's credit unions, I am writing to the National Credit Union Administration (NCUA) regarding an interagency¹ proposal to amend the regulations regarding loans in areas having special flood hazards to implement the private flood insurance provisions of the Biggert-Waters Flood Insurance Reform Act of 2012. The Credit Union National Association (CUNA) represents America's credit unions and their more than 100 million members.

Proposed Amendments

As mandated by the Biggert-Waters Act, the proposed rule would require lending institutions—including credit unions—to accept policies that meet the statutory definition of “private flood insurance” and permit them to accept flood insurance provided by private insurers that does not meet the statutory definition but does meet certain established criteria.

In October 2013, the Agencies jointly issued proposed changes to implement aspects of the Biggert-Waters Act, including provisions on private flood insurance. However, due in part to 2014 amendments to the Biggert-Waters Act, the Agencies decided to finalize certain aspects of the October 2013 proposal and re-propose the provisions on private flood insurance. The current proposal is similar to the October 2013 proposal regarding private flood insurance but incorporates input received during the comment period in 2013.

¹ The proposal is being issued jointly by the Federal Reserve Board, Federal Deposit Insurance Corporation, Farm Credit Administration, NCUA, and the Office of the Comptroller of the Currency (the Agencies). While the proposal would amend each agency's flood insurance regulations, this letter focuses on the proposed amendments as applicable to Part 760 of NCUA's Rules and Regulations.

While we generally agree with most of the proposed requirements, we ask NCUA to be mindful of placing additional regulatory requirements on credit unions and to provide adequate time for compliance with any new requirements, being mindful that the changes contemplated will affect most—if not all—credit unions.

Definition: “Private flood insurance” [§ 760.2 of NCUA’s Rule & Regulations]

As part of the Biggert-Waters Act amendments to the Flood Disaster Protection Act of 1973, a definition of “Private flood insurance” was established. Almost verbatim from the statutory definition, the proposed rule implements Biggert-Waters by defining “Private flood insurance” to mean an insurance policy that:

- 1) Is issued by an insurance company that is licensed, admitted, or otherwise approved to engage in the business of insurance by the insurance regulator of the state or jurisdiction in which the property to be insured is located; or, in the case of a policy of difference in conditions, multiple peril, all risk, or other blanket coverage insuring nonresidential commercial property, is recognized, or not disapproved, as a surplus lines insurer by the state insurance regulator of the state or jurisdiction where the property to be insured is located;
- 2) Provides flood insurance coverage that is at least as broad as the coverage provided under a standard flood insurance policy (SFIP), including when considering deductibles, exclusions, and conditions offered by the insurer;
- 3) Includes a requirement for the insurer to give written notice 45 days before cancellation or non-renewal of flood insurance coverage to the insured and the lending institution, or a servicer acting on the institution’s behalf;
- 4) Includes information about the availability of flood insurance coverage under the National Flood Insurance Program (NFIP);
- 5) Includes a mortgage interest clause similar to the clause contained in an SFIP;
- 6) Includes a provision requiring an insured to file suit not later than one year after the date of a written denial for all or part of a claim under a policy; and
- 7) Contains cancellation provisions that are as restrictive as the provisions contained in an SFIP.

We support this proposed definition of “Private flood insurance,” which is statutorily required. In conjunction with the definition of “Private flood insurance,” the proposed rule would define a SFIP as a standard flood insurance policy issued under the NFIP in effect as of the date the private policy is provided to a credit union. We believe this to be an appropriate time-frame for determining the version of the SFIP the credit union should use to evaluate the private policy.

Requirement to Purchase Flood Insurance [§ 760.3(c)(1) of NCUA’s Rule & Regulations]

This section currently sets forth the general requirement that a credit union cannot make a loan unless the building or mobile home and any personal property securing the loan is

covered by flood insurance for the term of the loan. The coverage amount must at least equal: the lesser of the outstanding principal balance of the designated loan, or the maximum limit of coverage available for the particular type of property under the National Flood Insurance Act of 1968 (referred to as the *mandatory purchase requirement*).

The proposal would amend this section to implement a provision of the Biggert-Waters Act that requires all lending institutions to accept “private flood insurance,” as defined in the statute, if certain conditions are met. Specifically, the proposed rule includes a new provision that would require a credit union to accept a private flood insurance policy that meets both: (1) the statutory definition of “private flood insurance,” and (2) the mandatory purchase requirement, described above.

We support this proposed section, as it is statutorily required under the Biggert-Waters Act.

Compliance Aid for Mandatory Acceptance [§ 760.3(c)(2) of NCUA’s Rule & Regulations]

Proposed “Safe harbor”: The October 2013 proposal included a “safe harbor” that would have permitted a financial institution that accepts private flood insurance to rely on the relevant state insurance regulator’s determination that the private insurance meets the statutory definition of “Private flood insurance.” Under the October 2013 proposed “safe harbor,” the insurance companies would have been responsible for obtaining written approval from the state insurance regulator.

As described in CUNA’s December 10, 2013, comment letter to NCUA in response to the October 2013 proposal, we supported the proposed “safe harbor.” The “safe harbor” would have eliminated any burden on lenders of having to determine the suitability of private flood insurance policies, and would have appropriately placed the burden on insurance companies, which are most familiar with the details of their private insurance policies. In addition, the proposed “safe harbor” could have helped position private insurance as an attractive option for borrowers since the borrowers would be ensured the insurance would be accepted by their credit union or other regulated lending institution because the private insurance would have already been approved by the state insurance regulator.

However, based on input received on the October 2013 proposal, the Agencies decided to replace the proposed “safe harbor” with a “compliance aid provision” in the current proposed rule. According to the Agencies, “many commenters raised concerns about the feasibility of state insurance regulators determining if private flood insurance is compliant with the Biggert-Waters Act, a Federal statute.” Further, commenters expressed concern over the current lack of a mechanism or process for a state insurance regulator to make such a determination. They also shared concern about a potential lack of consistency among the state regulators, which could result in numerous different state standards.

While we do not discount the concerns raised by these commenters in response to the October 2013 proposal, we believe most—if not all—of these issues could be overcome, particularly through guidance from the Agencies working together with state insurance regulators. Thus, we urge NCUA and the other agencies to revisit a possible “safe harbor,” as set forth in the October 2013 proposal. We believe a “safe harbor” that effectively eliminates or reduces the lending institution of liability in verifying whether a private insurance policy meets the statutory requirements is more appropriate than a tool that simply assists the lender in complying with the regulation.

Proposed “Compliance aid provision”: If the Agencies are unable to overcome commenters’ concerns regarding the October 2013 proposed “safe harbor,” we generally support the proposed “compliance aid provision.” As proposed, the “compliance aid provision” provides that a policy is deemed to meet the definition of “private flood insurance” if the following criteria are met:

- 1) The policy includes, or is accompanied by, a written summary that demonstrates how the policy meets the definition of private flood insurance by identifying the provisions of the policy that meet each criterion in the definition, and confirms that the insurer is regulated in accordance with that definition;
- 2) The lending institution verifies in writing that the policy includes the provisions identified by the insurer in its summary and that these provisions satisfy the criteria included in the definition; and
- 3) The policy includes the following provision within the policy or as an endorsement to the policy: “This policy meets the definition of private flood insurance contained in 42 U.S.C. 4012a(b)(7) and the corresponding regulation” (assurance clause).

As noted by the Agencies, the proposed “compliance aid provision” would not relieve a lending institution of the requirement to accept a policy that meets the definition of “private flood insurance” and the mandatory purchase requirement, even if the policy is not accompanied by a written summary and does not include an assurance clause.

Of the proposed “compliance aid provision’s” three criteria, we have concern with only the second criterion. We support credit unions verifying “in writing that the policy includes the provisions identified by the insurer in its summary and that these provisions satisfy the criteria included in the definition” as a best practice. However, we do not believe such verification should be explicitly mandated in the regulation. Clearly, a credit union, or other lending institution, should apply criterion three, endorsing the policy as in compliance with the statutory requirements, only after the institution has in fact verified that the policy is in compliance. We believe proposed criterion two is unnecessary and, thus, should be excluded from the “compliance aid provision.”

Discretionary Acceptance [§ 760.3(c)(3) of NCUA’s Rule & Regulations]

In addition to requiring lending institutions to accept private flood insurance policies that comply with the statutory definition of “private flood insurance,” the proposed rule would

expressly permit a lending institution to accept other types of flood insurance policies issued by private insurers, provided the following criteria are met:

- 1) The flood insurance policy issued by a private insurer would be required to be issued by an insurer that is licensed, admitted, or otherwise approved to engage in the business of insurance by the insurance regulator of the state in which the property to be insured is located. In the case of a policy of difference in conditions, multiple peril, all risk, or other blanket coverage insuring nonresidential commercial property, the flood insurance issued by a private insurer would be required to be issued by a surplus lines insurer recognized, or not disapproved, by the insurance regulator of the state where the property to be insured is located.
- 2) The flood insurance policy issued by a private insurer would be required to cover both the mortgagor(s) and the mortgagee(s) as loss payees.
- 3) A flood insurance policy issued by a private insurer must provide for cancellation following reasonable notice to the borrower only for reasons permitted by FEMA for an SFIP on the Flood Insurance Cancellation Request/Nullification Form, in any case of nonpayment, or when cancellation is mandated pursuant to state law.
- 4) A flood insurance policy issued by a private insurer must either be “at least as broad” as the coverage provided under an SFIP, or provide coverage that is “similar” to coverage provided under an SFIP, including when considering deductibles, exclusions, and conditions offered by the insurer.

We support the proposed provision to permit a credit union to accept private flood insurance that falls outside of the regulatory definition but that meets the above criteria. We believe the proposed discretionary acceptance provision will provide credit unions with greater flexibility to accept flood insurance policies that do not contain all of the requirements included in the definition of “private flood insurance.” Further, we agree with the Agencies that these proposed criteria should provide safeguards so a lending institution does not accept policies that do not sufficiently protect the collateral securing the loan.

Allowing lending institutions to accept private insurance that does not fit squarely within the regulatory definition of “Private flood insurance” has the potential to foster greater competition in the private flood insurance marketplace. In addition, this could allow for flood insurance policies tailored to the needs of a geographic area better than the one-size-fits-all approach of the current regulatory scheme. Further, more focused private flood insurance policies could potentially reduce costs to borrowers.

While we support the proposed discretionary acceptance provision, we stress that it is critical that acceptance of alternative private flood insurance remain within the sole discretion of the credit union. We strongly oppose any changes to the proposed rule that would make acceptance of such insurance compulsory.

Timing

Because of all of the new regulations that credit unions are currently managing, we ask NCUA to provide adequate time for them to comply with the provisions in the proposed regulation.

While NCUA has not included a possible effective date, since the changes contemplated in the proposal will require updates to forms and systems, we request an effective date that is no less than 180 days from the date a final rule is published in the *Federal Register*.

Conclusion

On behalf of America's credit unions and their more than 100 million members, we thank you for the opportunity to express these views to NCUA regarding the interagency proposal on private flood insurance. As described above, CUNA generally supports the proposed private flood insurance provisions and we urge NCUA to address the concerns we have raised. If you have any questions about our comments, please do not hesitate to contact me at (202) 508-6743.

Sincerely,

A handwritten signature in blue ink that reads "Luke Martone". The signature is written in a cursive style with a long horizontal stroke at the end.

Luke Martone
Senior Director of Advocacy & Counsel