



strength in members.

January 6, 2017

Gerard S. Poliquin, Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314-3428.

Dear Mr. Poliquin,

I am writing this letter on behalf of the New York Credit Union Association to comment on the proposed joint regulations implementing provisions of the Biggert-Waters Act. Specifically, 42 U.S.C.A. § 4012(a)(b) requires lenders to accept private flood insurance that is “at least as broad as the coverage provided under a standard flood insurance policy under the National Flood Insurance Program.” This measure represents a fundamental shift in how flood insurance has traditionally been provided. While credit unions support the effort to expand flood insurance options for consumers, we do not feel that the regulation implementing this proposal goes far enough to shield institutions from liability when legal disputes about the deficiencies of such policies inevitably arise.

To put the Association’s concerns into perspective, some background about the evolution of the National Flood Insurance Program (NFIP) is necessary. Since 1993, FEMA has administered a so called “Write-Your-Own program” permitting insurance companies to issue policies as part of the NFIP program (44 CFR 62.23 et.seq.) Despite the name of the program, the policies issued pursuant to this authorization are strictly regulated by FEMA. For legal purposes, insurance companies operating under this program are considered to be nothing more than agents of the federal government. (MC GAIR v. AMERICAN BANKERS INS. Co. of Florida), 693 F. 3d 94.96 (1st Cir. 2012)). In fact, so long as insurers do nothing more than offer policies that conform to the precise requirements proscribed by FEMA, they are not liable in the event a court finds that a policy does not adequately provide mandated coverage (See Id.100-101).

The Biggert-Waters Act seeks to develop a truly vibrant market for mandated flood insurance. It does this by mandating that financial institutions accept policies that comply with NFIP standards and imposing steep penalties on those who fail to do so. Therefore, it is in the interest of mortgagees, mortgagors and insurers to have clear guidance as to what is and is not acceptable insurance.

Credit unions understand the desire of Congress to increase private insurance options. At the same time, they remain concerned that the proposed regulations impose too great a burden on lenders. The truth is that, as proposed, lenders will need to make insurance determinations that some will not have adequate expertise to make. In addition, all lenders face the risk of increased liability if they wrongly determine that a private insurance policy meets NFIP standards. Regulators are proposing to address these concerns by authorizing lenders to mandate that private insurers provide a written summary that demonstrates how a policy meets the definition of private flood insurance and includes an endorsement or written statement that a “policy meets the definition of private flood insurance contained in 42 U.S.C. 4012(a)(b)(7) and the corresponding regulation” (assurance clause). Unfortunately, lenders would still have to verify in writing that the policy includes the provisions identified by the insurer. Regulators can, and should, strengthen the protections provided to lenders who in good faith accept policies that they believe meet National Flood Insurance standards.

Lenders should be given a “safe harbor” from liability whenever they accept insurance policies with endorsements from insurers that the policies comply with all flood insurance requirements. Doing so would in no way be inconsistent with Biggert-Waters. The purpose of this statute is to encourage private insurers to enter the market, not to orchestrate a shift in the liability framework. As noted above, the courts have traditionally made FEMA responsible for defending against liability claims based on policies sold by private insurers using language mandated by FEMA. It is perfectly consistent with this approach to make insurance companies selling policies they contend comply with NFIP requirements to be the party primarily responsible for defending such claims. This approach will ensure that lenders are not penalized for accepting private insurance and create an incentive for insurers to provide adequate insurance. Lenders can still be held responsible in the event that they provide a mortgage in a flood insurance zone without requiring that the borrower obtain flood insurance.

Credit unions and lenders are often on the front lines dealing with members affected by natural disasters. They understand firsthand the need to provide adequate, cost-effective insurance. This goal can and should be accomplished by allowing lenders to rely on the expertise and representation of insurance providers.

Sincerely,

A handwritten signature in black ink, appearing to read "W. J. Mellin". The signature is fluid and cursive, written in a professional style.

William Mellin
President/CEO
New York Credit Union Association