

January 6, 2017

Legislative and Regulatory Activities Division  
Office of the Comptroller of the Currency  
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Washington, D.C. 20219

Submitted via: [www.regulations.gov](http://www.regulations.gov)

**Re: Loans in Areas Having Special Flood Hazards: Private Flood Insurance;  
Docket ID: OCC-2016-0005**

To: The Federal Agencies Considering Proposed Rules Impacting Flood Insurance:

The undersigned organizations, the American Insurance Association (AIA), the National Association of Mutual Insurance Companies (NAMIC) and the Property Casualty Insurers Association of America (PCI), (collectively, Organizations) support the development of a robust private flood insurance market as a viable alternative to the National Flood Insurance Program (NFIP).

The Organizations are pleased to provide the following comments on the Office of the Comptroller of the Currency's joint Notice of Proposed Rulemaking (NPR) for loans in areas having special flood hazards published on November 7, 2016. The Organizations are submitting comments on behalf of their member companies that include the majority of the property casualty insurers doing business in the United States.

Rules implementing provisions of the Biggert-Waters Flood Insurance Reform Act of 2012 (BW-12) will impact the acceptance of private flood insurance coverage by regulated lenders. Federal law requires property owners with federally-backed mortgages in special flood hazard areas (SFHAs) to purchase flood insurance. There is nothing in current law (including BW-12) that restricts the ability of consumers to purchase flood insurance from the private market. However, the purpose of adding specific provisions in BW-12 was to encourage development of the private flood insurance market by allowing lenders to accept private policies to satisfy the existing law's mandatory purchase requirement. While the proposed rules offer some progress compared to those proposed in the 2013 NPR, the new proposed rules still do not provide the insurance industry (or lenders) with the flexibility needed to encourage growth of the private flood market, nor do they allow for easy acceptance by the lenders to satisfy the mandatory purchase requirement.

The Agencies request comments on "the proposed rule that would require lenders to accept policies that meet the statutory definition of private flood insurance" in BW-12 and "permit such institutions to accept private flood insurance policies that do not meet the statutory definition of 'private flood insurance' on a discretionary basis, subject to restrictions."

#### Definition

The proposed rule amends the "definitions" section to include a requirement that appears to eliminate the ability of lenders to accept an Excess and Surplus (E&S) lines insurance policy on residential risks. Currently, this is one area of the private flood insurance marketplace that has been growing, and this provision alone would make E&S policies unacceptable to lenders, stunting the growth prospects of a private flood market.

Development of new coverages and products are often initially written by E&S lines insurers as this structure provides regulatory flexibility while the marketplace develops. Once products are developed and loss experience is gained, then the "admitted" insurers usually enter the marketplace. Placing such a restriction on the market with regard to residential insurance policies ensures that development of a robust, competitive marketplace, where residential property owners have numerous choices with regard to purchasing flood insurance, will develop very slowly. That is contrary to the intent of BW-12 to encourage private flood insurance market development.

The proposed revisions to the definition also include other requirements that mirror the current flood insurance policy provisions, but that actually conflict with state insurance regulatory requirements, thus failing to make the product a viable alternative. For example: the 45-day cancellation or non-renewal provision, while practical,

does not meet the state regulatory requirements for cancellation or non-renewal in many states. Some states provide shorter periods (e.g., 30 days) and others require longer periods for such action (e.g., 60 days or 90 days). This restriction will make it difficult not only for private insurers, as their products must comply with state statutory and regulatory requirements, but for regulators who would not be able to approve the 45-day provision in policy language if their state's requirements are different.

This same issue exists for filing "suit not later than one year after the date of a written denial" related to a claim. Some states have statutes that require insurers to provide two, three or more years to bring suit. While in this case, the time frame is always longer than required by the proposed rule, the provision that the policy be different than state requirements will create issues for insurers and regulators as well.

Additionally, the proposed rule suggests that contents coverage must be offered; however, in the case of lender-placed insurance, many states have restrictions prohibiting offering contents coverage for this product type. Therefore, we encourage the authors to consider language that accommodates instances where there could be a conflict between the provisions of an NFP policy and existing state law.

Finally, in this section there's a requirement that the policy "contain cancellation provisions that are as restrictive as the provisions contained in the NFIP." This will likely frustrate insurers, regulators and lenders as every state has very specific cancellation and non-renewal provisions that may be different from those contained in the NFIP.

The proposed definition will essentially make it harder for insurers, regulators and lenders to develop, obtain approval and accept private flood insurance policies. Our suggestion would be to allow the laws and regulations for the state in which the residential property is located or the named insured's principal place of business to govern these requirements. Insurers, regulators and lenders have worked with these differing state requirements for over a century and all find them acceptable for other property insurance policies and perils insured.

In order for the private marketplace to develop and provide consumers with choices for flood insurance protection, the rule should reflect, as closely as possible, the current legal and regulatory requirements and conditions that exist in the states today – since the jurisdiction over and compliance provisions for private insurance products currently resides with the states.

#### Compliance Aid for Mandatory Acceptance

The background for this portion of the proposed rule includes a significant discussion of the idea of a "safe harbor" for the parties involved, and in particular, the lenders. While we understand the desire to provide guidance for all involved, the proposed compliance aid will yet again, prevent innovation and artificially restrict development of a competitive private marketplace.

The proposed rule provides a requirement that *the policy* "includes, or is accompanied by, a written summary that demonstrates how the policy meets the definition of private flood insurance..." Including such a summary as part of the policy contract is not a workable requirement. In every state, the insurance policy is considered a legal and binding contract and it typically contains a statement that all the provisions are contained in the contract and that if any other statements or comments are provided, the contract language governs. Our industry is not opposed to including a summary of the coverage or some other method of identifying the provisions of the policy, including how they may differ from provisions contained in the Standard Flood Insurance Policy (SFIP) issued through the NFIP. However, such a disclosure will necessarily include a statement that the written summary or coverage differences document is not considered part of the policy contract and, again, that if there are conflicting statements – the policy contract governs.

Insurers may not be willing to provide "within the policy or as an endorsement to the policy" as statement that "This policy meets the definition of private flood insurance contained in 42 U.S.C. 4012a(b)(7) and the corresponding regulation." This requirement basically states that the provisions of the private flood policy are the same as the provisions in another policy contract. Such a certification violates the "entirety of the contract" standard wording contained in insurance policies, since a comparison to another contract, that may or may not change over time, would be necessary. Insurance policies already contain a "conformity to statute" clause that allows for such conditions to be met or that change due to enactment of new legislation that would impact the policy contract provisions.

### Discretionary Acceptance

According to the proposed rule, lenders are afforded some “discretion in accepting a flood insurance policy issued by a private insurer that does not meet the statutory definition, but otherwise would provide coverage consistent with the FDPA...”

The proposed discretionary acceptance again differs for non-residential policies, with appropriate reliance upon the state regulatory system, versus residential policies under which it appears that again, E&S lines policies would not be acceptable.

In the proposed rule for non-residential properties, the discretionary acceptance provisions appear to require that the coverages be at least as broad as those provided in an NFIP policy or similar to those provided by the insurer for other products. The rule requires that the lender compare the policy to the SFIP; determine that the procured policy provides sufficient protection for the loan; and, document its findings. These proposed rules do allow lenders the discretion to accept private flood policies that differ from the rules for the mandatory purchase requirement.

Lenders should be permitted to accept any private flood insurance policies or endorsements that meet the above criteria, are offered by licensed, admitted or E&S lines insurers to the same extent that they are able to accept such policies for other perils insured against (e.g., fire, windstorm, etc.), provided that the policy provisions do not present any undue risk to the lending institution. Such broad acceptance is necessary in order to encourage insurers to provide innovation in the marketplace, include such coverage in other products, and provide businesses with protection tailored to their specific needs. Further, the rule should be expanded to allow such discretionary acceptance of E&S lines policies for residential properties.

### Conclusion

As stated, the Organizations and their members support the development of a robust private flood insurance marketplace to provide consumers with choices for their flood insurance protection. We offer these comments to illustrate that it is vitally important to make the acceptability of private flood insurance by lenders simple, efficient and effective. We greatly appreciate the opportunity to share our views and provide comments to the OCC and the Agencies regarding the Notice of Proposed Rulemaking.

Respectfully Submitted,

The American Insurance Association (AIA)  
The National Association of Mutual Insurance Companies (NAMIC)  
The Property and Casualty Insurers Association of America (PCI)