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January 6, 2017

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**Subject: Loans in Areas Having Special Flood Hazards—Private Flood Insurance
(81 FR 78064)**

To Whom It May Concern:

On November 7th, 2016, the above listed Federal agencies jointly published a second notice of proposed rulemaking to implement Section 239 of the Biggert-Waters Flood Insurance Reform Act. Federal law requires a minimum amount of flood insurance for federally related mortgages in special flood hazard areas delineated by the Federal Emergency Management Agency (FEMA). Section 239 mandates that lenders accept private flood insurance meeting a statutory definition in order to satisfy the minimum coverage requirement.

In the first notice (78 FR 65108 [October 30, 2013]), the agencies proposed a safe harbor for lenders who rely on determinations by the state insurance commissioner that private



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flood insurance policies meet Biggert-Waters' definition. The majority of commenters¹ generally supported a safe harbor but had specific concerns over the commissioners enforcing a federal law that may conflict with state law.

In the second notice, the agencies propose instead:

- Mandatory compliance aid provisions for lenders to make the determination based on a private insurer certification that “is not a ‘safe harbor’ as generally understood;”²
- Discretionary acceptance provisions for private flood insurance policies that don’t meet the statutory definition but is otherwise consistent with Federal law.

The agencies are seeking comment on whether these provisions would facilitate lender compliance, disrupt or limit the private market, or raise any safety and soundness or consumer protection issues.

The National Association of REALTORS® (NAR) believes the Biggert-Waters definition of private flood insurance is unworkable. The agencies are struggling and have issued two proposed rules because Congress intended to remove barriers to a private market but adopted a definition that could create barriers to a private market. Under the definition, private flood insurance must meet all six criteria which were borrowed from rescinded FEMA mandatory purchase guidelines and not intended by FEMA to be used in this way.³ As NAR demonstrates below, using these six criteria could rule out most of the market except private insurers who adopt NFIP’s policy form with minor changes:

1. *Issued by an admitted insurer* – Excludes virtually all existing residential private flood insurance, including single family,⁴ multi-family⁵ and condominium policies.⁶ NAR is aware of just one admitted carrier providing first dollar coverage (TypTap in FL); the rest are surplus or excess lines approved in at least one state but not others. According to the National Association of Professional Surplus Lines Offices, in six states alone (CA, FL, TX, NY, MS, and NV) this surplus lines market generated flood insurance premium of \$126.6 million in 2014, of which \$9.9 million was for primary residential flood insurance coverage and \$23.7 million was for excess residential flood coverage.
2. *Coverage “as broad as” NFIP* – Eliminates most nonresidential flood insurance policies. In the agencies’ own words: “The Agencies understand that flood insurance policies issued by private insurers covering loans secured by nonresidential properties, such as commercial properties, may have coverage, deductibles, exclusions, and conditions that differ from NFIP policies based on the type, size, and number of nonresidential properties covered by the policy. In some instances, such policies are individually negotiated and tailored to the nonresidential property that secures a loan. The Agencies request comment on whether the proposed definition of “private flood insurance” or the proposed discretionary acceptance provision, both of which include specific requirements with respect to deductibles, exclusions, conditions, and cancellation, would prevent regulated lending institutions from accepting flood insurance policies issued by private insurers in the nonresidential lending context, even though coverage not including these requirements would be acceptable for policies covering another type of risk, such as fire or wind.”⁷

¹Unless otherwise noted, all comments referenced in this letter may be found in the online docket for the 2013 proposed rule at:

<https://www.regulations.gov/docket?D=OCC-2013-0015>

²See Footnote 17 on 81 Fed. Reg. 78068.

³ According to FEMA’s memo dated March 7, 2012, “the Guidelines list six elements that FEMA suggest that a lender consider in evaluating a private policy. These elements are not meant to be exclusive and if a lender is satisfied that a private policy adequately protects his security for a loan despite not containing some of these elements or differing with them, it is within his authority to accept the private policy.” See:

http://www.aba.com/aba/documents/ABIA/3.7.12_FEMA_PositionOnPrivateFloodInsuranc.pdf

⁴ For example:

http://www.wncinsuranceservices.com/NEWS/Excess_Flood_Product_Card_v050812.pdf

<https://www.pureinsurance.com/misc/pure-uploads/flood-coverage-chart.pdf>

⁵ Under this criterion (42 USC 4012a(b)(7)(A)), surplus lines may write “difference-in-conditions, multiple peril, all risk, or other blanket coverage insuring nonresidential commercial property” but this would exclude *residential* commercial buildings (apartments or mixed use buildings) and, arguably, the non-commercially owned buildings including churches, schools and other public buildings.

⁶ In its comments on the 2013 proposed rule, Wells Fargo noted that the majority of its private policies insure condo associations.

⁷ 81 FR at 78070.

NAR also questions whether residential policies with named-storm/hurricane deductibles or anti-concurrent causation clauses would pass examination under this criterion.

While NAR appreciates the agencies' clarification of this term,⁸ it is unclear whether any private policy other than the NFIP form would meet the agencies' interpretation. If there are acceptable non-NFIP policy forms, NAR would encourage the agencies to post examples to facilitate lender compliance.

3. *Cancellation as restrictive as NFIP* – Rules out any remaining private policies not excluded by criterion 1 or 2.⁹ NFIP's form does not actually have provisions allowing the insurer to cancel, so any private plan allowing insurer cancellation would be less restrictive – even though it's in the consumer's interest to have those provisions spelled out in the insurance contract just as it is in the standard homeowners policy.
4. *45-Day Cancellation/Nonrenewal Notice* – Conflicts with many state laws which vary from 10-90 days and, according to RIMS' comments, also conflicts with the standard commercial and most condo private flood insurance policies.
5. *Similar Mortgage Interest Clause* – Conflicts with standard commercial and most condo policies.¹⁰ NAR also notes the agencies are not proposing that private flood insurance include a similar clause for discretionary acceptance; only that lenders are named loss co-payees.
6. *Requirement to bring suit within 1 year* – Disqualifies residential and commercial policies with a different or no statute of limitations. One private policy¹¹ was rejected for not placing any time limit on the policyholder's right to sue and the insurer was forced to insert the 1-year limitation which was less protective of consumer interests in order to pass examination.

As a result of this flawed definition, lenders are defaulting to over-priced NFIP policies that don't protect consumers but do expose the NFIP Fund and lenders to unnecessary risk. According to independent actuaries, many NFIP policyholders are paying too much relative to the risk.¹² Some of this is because NFIP's mapping and rating methods are outdated, and modernization requires lengthy rulemakings. Other policyholders are seeing the NFIP subsidies phase out exponentially and past full-risk levels because they're not opting to obtain elevation certificates.

While the NFIP continues to ensure critical access to coverage in all markets at all times, in some markets, private insurers are now offering better coverage for hundreds-to-thousands of dollars less. Many insurers are using the NFIP policy form but adding coverage.¹³ This is occurring mostly in A zones but also the highest risk V zones as well.

NAR members advocate for the lowest cost option that meets minimum federal coverage requirements, regardless of whether the source is NFIP or the private market. If lenders are turning away more affordable NFIP-plus policies just because they're privately underwritten, then NAR questions whether consumers are being fully protected and taxpayers, as well as lenders, are missing out on vital flood protection.

NAR recommends the agencies follow congressional intent and adopt the House-passed definition for the discretionary acceptance of private flood insurance. The Flood Insurance Market Parity and Modernization Act (H.R. 2901 by Reps. Ross, R-FL and Murphy, D-FL in the 114th Congress) offers an alternative definition that would stimulate the private market and resolve

⁸ The agencies propose that, to be as broad as an NFIP policy, the private policy must include NFIP's flood definition, coverages, deductibles, exclusions and conditions and also name the lender as a loss co-payee. See 81 FR at 78066 for more specifics.

⁹ Several commented on this but in particular, please see Poulton's comments pp. 9-11.

¹⁰ According to Bank of America's comments.

¹¹ According to Poulton's comments.

¹² For more on the Milliman study, please see: <http://www.narfocus.com/billdatabase/clientfiles/172/4/2733.pdf>

¹³ For instance: <http://www.privatemarketflood.com/policy-form/>

implementation conflicts between state and federal law. The House of Representatives unanimously passed this bill 419-0¹⁴ but the Senate did not take it up before the end of the session.

Under the bill, private flood insurance would continue to meet federal law's minimum coverage requirements as well as state law for deductibles, cancellation and other matters of the insurance business. As passed, the bill also clarifies that the Government Sponsored Entities (GSEs) may continue to set financial strength requirements consistent with this, and nothing precludes the agencies from adding a lender loss co-payee provision to the House's definition. The National Association of Insurance Commissioners (NAIC) has also offered to work with the agencies, the GSEs and FEMA to develop any additional standards that would be required in the legislation.¹⁵

The agencies have ample authority to adopt the House-passed definition.¹⁶ While there may be less flexibility on mandatory acceptance, as the agencies state, the statute is silent on whether lenders can accept private flood insurance not meeting the statutory definition.¹⁷ NAR agrees that congressional intent was to stimulate a private market¹⁸ and the state insurance commissioners are best positioned to regulate the business of insurance and protect consumers. The majority of commenters were also supportive of broad discretionary acceptance provisions in response to a specific request for comment from the agencies in the first proposed rule notice.¹⁹

NAR also believes that a final rule based on the House definition would be logical outgrowth of the two proposed rules. NAR and many other commenters have established (a) that the Biggert-Waters definition is unworkable and (b) a broader definition is necessary to implement the rule consistent with congressional intent. The agencies seem to recognize this,²⁰ and are taking comments on a broader definition that allows private policies "similar to NFIP." It is unclear why limiting the market to admitted carriers is necessary if it would disrupt a substantial commercial and residential market dominated by surplus lines and the surplus lines are providing NFIP-or-better coverage, naming lenders as loss co-payees and meeting the financial strength requirements of the GSEs.

For mandatory acceptance, the agencies should explore additional options to facilitate and incentivize lender compliance, including:

- **Broadening the Definition.** The agencies assert they may not make substantive changes to the Biggert-Waters definition for mandatory acceptance purposes,²¹ yet do interpret terms like "as broad as" to make them workable. NAR notes that courts have sided with agencies deviating from statutes out of administrative necessity or where the plain text creates absurd results.²² In this instance, NAR and others have demonstrated how use of the definition is inconsistent with congressional

¹⁴ For the roll call vote: <http://clerk.house.gov/evs/2016/roll177.xml>

¹⁵ See NAIC's comments on the 2013 proposed rule.

¹⁶ The agencies cite their authority under 42 USC 4012a(b) to issue a discretionary acceptance provision but NAR would also point to Section 4128(b) (i.e., "[the agencies] shall, in cooperation with the Administrator, issue appropriate rules and regulations to govern the carrying out of the agency's responsibilities under this Act") and Section 4001 note ("[the agencies] may each issue any regulations necessary to carry out the applicable provisions of this title [i.e., National Flood Insurance Reform Act of 1994]....")

¹⁷ 81 FR at 78068.

¹⁸ H. Rep. No. 112-102, at 1 (2011); *see also* 158 Cong. Rec. H4622 (daily ed. June 29, 2012) (statement of Rep. Biggert).

¹⁹ 81 FR at 78068.

²⁰ 81 FR at 78070: "The Agencies understand that [nonresidential] flood insurance policies ... may have coverage, deductibles, exclusions, and conditions that differ from NFIP policies based on the type, size, and number of nonresidential properties covered by the policy. In some instances, such policies are individually negotiated and tailored to the nonresidential property that secures a loan."

²¹ 81 FR at 78066.

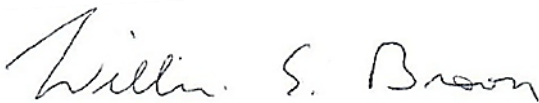
²² The EPA effectively used both arguments to justify the Tailoring Rule which deviated substantially from the plain text of the Clean Air Act. While the DC Circuit did not directly weigh in on the merits of these arguments, the opinion does summarize the case law on both legal doctrines which the agencies should consider. To read the opinion: [https://www.cadc.uscourts.gov/internet/opinions.nsf/52AC9DC9471D374685257A290052ACF6/\\$file/09-1322-1380690.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/52AC9DC9471D374685257A290052ACF6/$file/09-1322-1380690.pdf)

intent (e.g., rejecting private policies with insurer cancellation provisions or longer statutes of limitation that better protect consumers).

- **Developing Standard Private Policy Forms.** It appears that many surplus lines are already defaulting to the NFIP policy in order to pass mandatory purchase examination. NAIC has offered to work with the agencies, GSEs and FEMA to develop more appropriate standards consistent with federal law during the 2013 proposed rule.²³ NAR encourages the agencies to pursue this opportunity.
- **Alternative Certifications and Disclosure.** The agencies should consider clarifying that private insurers who certify that either a) they're using the NFIP policy and only adding coverage or b) will default to the NFIP policy in the event of a claims dispute meets the statutory definition and will not be subject to mandatory purchase enforcement. NAR notes that the American Bankers Association proposed a similar certification²⁴ which was widely supported by lenders commenting on the 2013 proposed rule. Also any major substantive differences between the NFIP policy and the private policy should be disclosed. Knowing the differences would do more to help consumers and lenders decide than a simple listing of which paragraphs in the insurance policy meet which term of the Biggert Waters definition, as the compliance aid provision is currently structured.
- **Provide a Safe Harbor from Mandatory Purchase Enforcement.** As the agencies recognize, the compliance aid provision would not provide a safe harbor²⁵ and at least one law firm is questioning how much legal recourse the provision would provide.²⁶ Without a safe harbor (which is entirely within the agencies' purview), many lenders will continue to default to the NFIP policy until they're certain that decisions to accept an alternative policy can't be second guessed by examiners. Further, the majority of commenters on the first proposed rule supported the safe harbor concept; any concerns raised had to do with the specifics of how it would work, not with the concept itself. It is unclear why the agencies completely abandoned the concept; NAR would urge the agencies to take another look and consider basing it on the standard private policy and/or alternative certification options outlined above.

Thank you for re-proposing the private flood insurance rule and providing a second opportunity to comment. NAR looks forward to working with the agencies to encourage private market options and competition that increases take-up rates of flood insurance and brings down the cost of coverage meeting federal law.

Sincerely,



William E. Brown
2017 President, National Association of REALTORS®

²³ See NAIC's comments.

²⁴ The proposal is described on pp. 4-6 of ABA's comments.

²⁵ Again, 81 FR at 78068, Footnote 17.

²⁶ See Mayer Brown's summary of the current notice of proposed rulemaking:

<http://www.mondaq.com/unitedstates/x/550052/Insurance/Agencies+Address+Acceptance+of+Private+Flood+Insurance>