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Re: Loans in Areas Having Special Flood Hazards; RIN 1557-AD67; RIN 7100AE-00; RIN 3064-AE03; RIN 3133-AE64; RIN 3133-AE18
Docket ID: OCC-2016-0005

Ladies and Gentlemen:

Poulton Associates Inc. is in Salt Lake City, Utah. Poulton Associates is engaged in the business of property and casualty insurance brokerage. Our organization acts as the Underwriting Manager and Administrator of the Natural Catastrophe Insurance Program (NCIP). The Natural Catastrophe Insurance Program is available to a greater or lesser degree in all 50 states, through over 6,000 independent insurance production offices. Under the NCIP, the perils of flood, earthquake and landslide may be insured for both personal and commercial properties.

In response to the proposed rule and the specific requests for comments contained in the joint notice of proposed rulemaking, we provide the following.

Summary Comments

Authority

We would like to acknowledge the Agencies' efforts to reconcile the faulty statutory definition of "private flood insurance" with the growing private flood insurance market anticipated by the Biggert-Waters Flood Insurance Reform Act of 2012. We believe the Agencies have in the proposed revised rule attempted to address many of the concerns raised in past comments provided by us, and many other interested parties. However, we believe the proposed revised rule contemplates unauthorized, un-workable and unintended criteria for the acceptance of private flood insurance that will contravene congressional intent.

Unfortunately, the proposed revised rule is essentially a codification of the status quo and will result in the same stifling of private flood insurance that has resulted from existing lender-administered flood insurance regulation as overseen by federal bank examiners who have demonstrated a severe lack of knowledge concerning insurance matters; such as continually forcing lenders to reject all "private" policies issued by any "private insurer" that does not appear on the list of "WYO private insurers" on the NFIP web site. In other words, many if not most federal examiners do not know the difference between a private policy and an NFIP policy issued by a WYO.

The overriding intent of Section 100239 of the Biggert-Waters Flood Insurance Reform Act is to assure the widespread availability of privately underwritten flood insurance. Recognizing the applicability of the McCarran-Ferguson act along with the definition of "private flood insurance" found in Section 100239 Congress clearly intends the definition of "private flood insurance" as a limiter to any forced acceptance of, or capricious rejection of, private flood insurance for use by state insurance regulators when a disagreement arises between a lender and a borrower over the compulsory acceptance of private flood insurance mandated by Section 100239.

The McCarran-Ferguson Act provides that the "business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." Nowhere in Section 100239 of the Biggert-Waters Flood Insurance Reform Act of 2012 does congress assign, countermand, or reassign this authority, and therefore the proposed

revised rule is inappropriate, inauthentic, and meritless.

Nowhere in the Act or in the Congressional record has Congress assigned to Regulators any authority to create criteria, or make any determinations concerning, discretionary acceptance of private flood insurance. Rather, the Agencies' instruction under the Act is limited to directing lenders in the mandatory acceptance of private flood insurance. Such instruction is not an assignment for Regulators to assign to lenders the regulation of private insurance products.

The Proposed Revised Rule

In the past and continuing to the present time, without authority to do so, Regulators through federal examiners have erratically penalized lenders for accepting private flood insurance policies based on inconsistent and unpredictable determinations made by uninformed federal bank examiners who then refused to engage with private insurers relative to their regulation of those insurers. The result of this unauthorized activity has been the improper exclusion of private flood insurance from the market to the detriment of lenders, consumers, and taxpayers and was the reason Congress passed Section 100239. The proposed revised rule will entrench this practice and will work against the acceptance of private flood insurance.

By applying the definition of "private flood insurance" only to policies which lenders are compelled to accept, with Section 100239 of the Biggert-Waters Flood Insurance Reform Act, Congress reaffirmed the pre-existing and self-evident right of lenders to accept without fear of penalty any flood insurance product compliant with the limits of insurance requirements in §339.3 for purposes of paragraph (a) of that section if the underwriter of the flood insurance policy meets any financial solvency, strength, or claims-paying ability requirement(s) then in place for purposes in §102(b) of the FDPA and a State insurance regulator properly allows such flood insurance to be sold under the laws of the state where the applicable property is located.

Because the proposed revised rule does not provide for an objective, simple, straightforward way to decide what does or does not meet the definition of "private flood insurance," the rule will result in frustrating the ultimate intended reason for the inclusion of Section 100239 in Biggert-Waters; the unfettered acceptance of private flood insurance by lenders.

Relative to both compulsory acceptance and discretionary acceptance, the proposed revised rule continues to ignore the very serious defects contained in the definition of "private flood insurance" found in Section 100239. Defects, such as the requirement for private insurance to contain "cancellation provisions that are as restrictive as the provisions contained in a standard flood insurance policy," when the NFIP SFIP policy refers to a raft of NFIP cancellation rules which are not "contained in" the NFIP flood insurance policy, many of which are in violation of statutes and regulations in all 50 states. This fact will make any compliant private policy containing out of compliance with state statutes or regulations in all 50 states. This defect in the proposed revised rule, standing alone, makes the rule unreasonable and unenforceable by lenders. It is irrational to expect lenders to settle such un-workable language while at the same time demanding of themselves the broader acceptance of private flood insurance knowing they will be unreasonably second guessed by bank examiners who are completely unqualified to speak to these issues.

The only proper and viable criteria for discretionary acceptance of private flood insurance is to recognize the pre-existing and self-evident right of lenders to accept private flood insurance policies if the private policy meets the limits of insurance requirements in §339.3 for purposes of paragraph (a) of that section if the underwriter of the flood insurance policy meets any financial solvency, strength, or claims-paying ability requirement(s) then in place for purposes in §102(b) of the FDPA and a state insurance regulator properly allows such flood insurance to be sold under the laws of the state where the applicable property is located.

A final rule which acknowledges the state role in regulating flood insurance and settling disagreements concerning compulsory policy acceptance, as mandated by Section 100239, is the only proper and practical way to accomplish the compulsory acceptance of private flood insurance as described in Section 100239 and in the manner intended by Congress. This approach will effectively and immediately open the door to increased private sector participation in the national flood insurance market as intended by Congress while recognizing the Section 100239 definition of "private flood insurance" as well as the mandates of the McCarran-Ferguson Act. It will enable new actuarial assumptions, underwriting paradigms, and private capital into the flood insurance market and will drive down costs for consumers. In turn, it will have a far-reaching impact in ensuring the sustainability of the National Flood Insurance Program by reducing its concentration of risk and will begin a process that will ultimately remove massive amounts of flood risk from taxpayers.

Expanded Comments

The House Committee Report on the Biggert-Waters bill declares that the legislation is intended to "increase the role of private markets in the management of flood insurance risk." Senator Dean Heller (R- NV) wrote to Thomas J. Curry, the Comptroller of the Currency, to reiterate the intent of Congress by stating, "In passing this legislation, it was the intent of Congress to reaffirm existing law that lenders accept private flood insurance policies as an alternative to NFIP insurance."

Lenders have always been legally free under the Act to accept privately issued flood insurance that complied with the limits requirements and which was legally for sale in the applicable state. That right is reaffirmed along with the addition of the financial strength provision and claims paying ability provision of the Act.

The proposed revised rule encumbers lenders with a requirement to engage in the regulation of private flood insurance by adjudicating the definition of "private flood insurance." There is no need to do this and no authority to do so is conveyed to Regulators by the Biggert-Waters Flood Insurance Reform Act. The McCarran-Ferguson Act of 1945 (15 U.S.C.A. § 1011 et seq.), wherein Congress expressly forbade any federal regulation of the "business of insurance," leaving that to the states, was clearly in mind when Congress refused to assign any authority to regulate or adjudicate the definition of "private flood insurance" to Regulators, Lenders or any other entity. It is obvious therefore that the definition of "private flood insurance" exists only as a construct for use by those to whom Congress has already assigned the regulation of the business of insurance: the states. No exception to McCarran-Ferguson is allowed for. The proposed revised rule relies on an exception that simply does not exist and which is not even intimated anywhere in the Act or in the Congressional record.

It seems eminently clear to us that by designating the essential elements of the NFIP guidelines as an internal definition of "private flood insurance" and by limiting the use of that definition to the creation of a mandatory acceptance mechanism, Congress does not intend that regulators extract and re-apply any elements of the definition to limit discretionary acceptance of private flood insurance. To do so would reinstitute lender uncertainty as to the acceptability of private insurance, relighting the fear of regulatory punishment that resulted from the too broad application of the NFIP private flood insurance "guidelines." This is certainly not the outcome intended by Congress.

All the standards needed to assure that privately underwritten flood insurance policies including those accepted by lenders on a non-compulsory basis will serve the purposes of the Act, fully comply with state insurance statutes and regulation, and be issued by only financially strong insurers are sufficiently contained in the Act without federal regulation of the definition of "private flood insurance."

- Because private insurers must submit to state regulation, the Act properly assumes that all privately underwritten flood insurance shall be compliant with state regulation and acceptable to state regulators. The Agencies should also respect that reality by not attempting to act in such a way as to violate McCarran-Ferguson by engaging in the regulation of private insurance carriers. The Act stipulates that all flood insurance policies must provide a minimum limit of insurance that is the lesser of the balance due on the mortgage loan or the maximum available limit of insurance under the NFIP.
- The Act stipulates that acceptability of all privately underwritten flood insurance shall be subject to financial stability and claims paying ability criteria mandated by regulators and GSEs.

The Act has contemplated these provisions as being the only universally applicable criteria for acceptability of private flood insurance for many years and no change to this precedent has been allowed for under Biggert-Waters except for the addition of the financial strength and claims paying ability criteria. Had these criteria been respected in years past as the only proper federally required criteria relative to satisfaction of the mandatory purchase requirement there would have been no need for Congress to create Section 100239 because private flood coverage would already be widely accepted.

These existing criteria serve to allow for states to oversee the market conduct of private flood insurers, assure that proper limits of insurance are maintained, and allow federal lending regulators and GSEs to promulgate adequate claims paying ability criteria. There is simply no demonstrable or practical need for additional criteria relative to the discretionary acceptance of privately issued flood insurance, or in any other area of property insurance.

Implementation of the proposed revised rule, without drastic alteration of the Act's definition of "private flood insurance," will extinguish any meaningful private market participation in the future. The content of the definition itself is a testament to the fact that it is ill suited for the purpose the proposed revised rule assigns it.

Lenders must be completely certain that they will not be subject to regulatory reprisal if they accept a

privately issued flood insurance policy that is properly allowed for sale by state regulators and meets the limits of insurance and financial strength and claims paying ability requirements of the Act. In the absence of such certainty, there will be no widespread discretionary acceptance of privately issued flood insurance by lenders. In fact, the opposite will happen and the private insurance market will face suppression. Any regulatory implementation of Section 100239 that does not assure lender certainty will not result in any appreciable increase in private market participation in the assumption of flood risk. The proposed revised rule improperly places the burden on financial institutions to certify the acceptability of flood insurance under federal law.

Assigning the adjudication of compulsory acceptance based on the appallingly flawed language found in the definition of "private flood insurance," let alone the thoroughly subjective determination as to what is "as broad or broader than" an NFIP policy to mortgage lenders --subject to the unpredictable countermanding by untrained, ill-equipped federal bank examiners --will result in lenders taking the course of least resistance. The course of least resistance will be to deny acceptance of essentially all private flood insurance policies. Lenders will do this to make certain they will not be found to be out of compliance. They will be most motivated in this regard, not by flood insurance related fines, but by the fact that too many of such findings by bank examiners will deny lenders the ability to engage in mergers or acquisitions as well as increasing the lender's cost of compliance. For this reason alone, the proposed revised rule will not advance the purpose of Section 100239.

It should be remembered that the defective definition of "private flood insurance" currently found in Section 100239 was not contained in the version passed by the House of Representatives and was unfortunately added to the final conference report for an unrelated transportation bill only hours before final passage. No one had time to read the definition let alone make comment on its numerous defects. The definition of "private flood insurance" focused on in the proposed revised rule was officially disavowed by the NFIP in 2012 prior to being made a part of the final version of Biggert-Waters and is no longer published by the NFIP. This repudiation of the language that became the definition of "private flood insurance" found in Section 100239 was based on the NFIP's recognition that the language was indeed defective and should never have been issued. Regrettably, the proposed revised rule gives more weight to the defects in the definition than it does to the overarching intent of Section 100239 of Biggert-Waters.

A certain consequence of the proposed revised rule will be a torrent of needless litigation. Borrowers who experience losses that are not covered by their NFIP policy but would have been covered by the private insurance policy the lender rejected based on the proposed revised rule will likely bring class action lawsuits. Private flood insurance facilities will likely bring actions against lenders since the lenders will not apply the same logic and standards used to deny private flood insurance policies to all other types of property insurance policies as required by consumer protection statutes. Litigation under the Federal Tort Claims Act is also very likely. Most importantly, there will likely be state attorneys general who perceive the actions of some banks as being violations of both criminal and civil statutes as they attempt to comply with the contorted architecture of the proposed revised rule in combination with other laws and regulations.

For similar reasons, over the years, state insurance regulators have not attempted to create definitions for insurance products but have required instead that when writing and administering any insurance contract, insurers always act in good faith. The results have been manifestly excellent and

far better than those achieved in other areas of financial regulation, where similar logic to that reflected in this proposed revised rule has been utilized.

The authority assigned by Congress to state insurance regulators in McCarran-Ferguson is replaced in the proposed revised rule with a new unauthorized federal flood insurance regulatory scheme created and overseen by Regulators through unqualified federal examiners and actuated by turning lenders into de facto private insurance regulators. Again, because lenders are not in the business of deciding insurance statutes, they will reject compliant private flood insurance policies in the name of efficiency and risk aversion, an outcome clearly against that anticipated in Biggert-Waters. Substituting lenders for state regulators in this manner is against common sense and in opposition to the interests of borrowers, taxpayers and lenders, as well as applicable law.

In comments submitted in 2013 we explained concerns with the requirement that the cancellation provisions must be the same as contained in the NFIP. We reiterate these same points in detail below to highlight for Regulators the difficulty in complying with only one facet of the proposed revised rule.

> In private insurance policies, the entire contract must be contained in the policy document. The issues related to cancellation, including the basis upon which the policy may be cancelled by the insured or by the company, must be fully described in the policy document. Such cancellation provisions must conform to specific cancellation language required in most states. The policy may only be cancelled for the reasons described in the cancellation provisions found in the policy document, a copy of which must be delivered to the insured by the producer or the insurer.
>
> In the NFIP SFIP, there is no section labeled "Cancellation," "Cancellation of This Policy" or "Terms of Cancellation" etc. where the terms of cancellation may be found. Further, there is no place in the SFIP that "contains" the the many basis upon which the policy may be cancelled; a consumer cannot know by reading only the Standard Flood Insurance Policy the basis upon which it may be cancelled or the conditions that will be observed relative to cancellation. The idea of the policy being cancelled is mentioned by the current version of the SFIP in only these four instances:
>
> 1. In the Definitions section;
> ***Cancellation.*** *The ending of the insurance coverage provided by this* ***policy*** *before the expiration date.*
>
> 2. In the General Conditions section under sub heading E;
> *E. Cancellation of Policy by You*
> *1. You may cancel this policy in accordance with the applicable rules and regulations of the NFIP.*
> *2. If you cancel this policy, you may be entitled to a full or partial refund of premium also under the applicable rules and regulations of the NFIP.*
> This is the only part of the SFIP that might be considered to begin to approach a "cancellation provision" as that term is understood in the insurance industry and as it has been mandated by state statutes and refined by the courts. It contains none of the terms upon which any cancellation will be governed; it only refers to applicable rules and regulations that are external to the contract. To comply with the definition, a private flood insurance policy must

contain a cancellation provision that is "*as restrictive as the provisions contained in a standard flood insurance policy under the national flood insurance program,"* yet no actual, normalized cancellation provisions are "**contained in**" the SFIP. This provision alone, if incorporated into a private policy, will disqualify such a "definition compliant" private flood insurance from being sold in any of the 50 states.

3. In the General Conditions section under sub heading Q;

   Q. Mortgage Clause
   3. …..If we decide to cancel or not renew this policy, it will continue in effect for the benefit of the mortgagee only for 30 days after we notify the mortgagee of the cancellation or nonrenewal.

   The requirement for insurance coverage to "continue in effect for the benefit of the mortgagee only for 30 days after notification of the mortgagee of the cancellation" found in the Mortgagee Clause" of the SFIP is the only mention of cancellation in the SFIP that could be easily measured since it is a thoroughly objective requirement. This provision could be complied with and still be within state regulatory boundaries. If implemented, it should apply only to the peril of flood.

4. In the General Conditions section under sub heading U;

   U. Duplicate Policies Not Allowed
   2. Your option under Condition U. Duplicate Policies Not Allowed to elect which NFIP policy to keep in effect does not apply when duplicates have been knowingly created. Losses occurring under such circumstances will be adjusted according to the terms and conditions of the earlier policy. The policy with the later effective date will be canceled.

   The "Duplicate Policies Not Allowed" section contains a mention of cancellation of a duplicate NFIP policy as the result of such duplicate insurance. This provision can be complied with and appears to provide no conflict with state regulations if reasonably interpreted. Similar wording is already contained in may private insurance contracts.

Other provisions of the definition have similar incongruous characteristics to those that we have specifically mentioned in this document. The difficulty in providing a path for a state regulated insurance contract to comply with the definition while still qualifying for sale in all 50 states is hard to overstate.

There are several simple, objective alternatives to the proposed revised rule that could be used by Regulators to implement the subject provisions of the Act. For example;
Regulators could require lender acceptance of any private flood insurance policy that contains a "statement of compliance." Such a statement could warrant that the private policy complies with the definition found in Section 100239 except when state statute or regulation precludes compliance.

Such a regulation combined with a formal recognition that, just as with all other types of property insurance, lenders continue to be free to accept any private flood insurance policy that meets the

limits of insurance requirements in §339.3 for purposes of paragraph (a) of that section if the underwriter of the flood insurance policy meets any financial solvency, strength, or claims-paying ability requirement(s) then in place for purposes in §102(b) of the FDPA and a state insurance regulator properly allows such flood insurance to be sold under the laws of the state where the applicable property is located, is an objective, inexpensive, easily implemented solution.

Conclusion

The Agencies should issue a final rule that serves to promote and increase the participation of private insurers in the flood insurance market not impede it. An effective rule will:

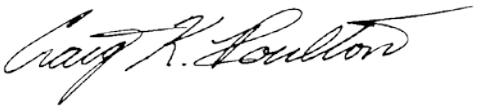
1- State clearly that lenders shall not be penalized by Regulators in any way if any lender exercises its right to accept any flood insurance policy or endorsement to an insurance policy as long as that policy or endorsement is compliant with the limits of insurance requirements in §339.3 for purposes of paragraph (a) of that section, the underwriter of the flood insurance policy meets any financial solvency, strength, or claims-paying ability requirement(s) then in place for purposes in §102(b) of the FDPA, and a state insurance regulator properly allows such flood insurance to be sold under the laws of the state where the applicable property is located.

2- Restrict use of the definition of "private flood insurance" contained within the Act to its use by state regulators as a restraint to the rejection of, or forced acceptance of, private flood insurance by lenders as intended by Congress and provide specific instruction that it should not be used as criteria for the discretionary acceptance of privately issued flood insurance.

3- As required by the McCarran-Ferguson Act, leave with state insurance regulators the responsibility for deciding differences of opinion relative to the compulsory acceptance of "private flood insurance" contained within the Act just as Regulators now do with all other forms of property insurance.

In our view this approach is a comprehensive answer to all the questions and considerations concerning Section 100239 contemplated within the joint notice and proposed revised rule. It is objective, simple, and straightforward. It protects flood insurance buyers, lenders, and taxpayers. It respects McCarran-Ferguson and negates the needless and significant liability and expense that is inherent in the proposed revised rule by simply recognizing the existence and adequacy of state regulation.

Respectfully,



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