Collaborative Risk Management
for the Financial Community

January 4, 2017

Legislative and Regulatory Activities Division
Office of the Comptroller of the Currency
400 7th Street SW., Suite 3E-218
Mail Stop 9W-11
Washington, DC 20219
Re: Docket ID OCC-2016-0005

Robert E. Feldman, Executive Secretary
Attention: Comments/Legal ESS
Federal Deposit Insurance Corporation
550 17th Street NW.
Washington, DC 20429.
Re: Loans in Areas Having Special Flood Hazards—Private Flood Insurance

Robert deV. Frierson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue NW.
Washington, DC 20551
Re: Docket No. R-1549 / RIN 7100 AE 60

Barry F. Mardock, Deputy Director
Office of Regulatory Policy
Farm Credit Administration
1501 Farm Credit Drive
McLean, VA 22102-5090

Gerard S. Poliquin, Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314-3428
Re: RIN 3133-AE64

Dear Sirs/Madams:

I am writing you in regard to the proposed rule titled "Loans in Areas Having Special Flood Hazards – Private Flood Insurance." Our organization provides insurance tracking services to various lending institutions, with a particular focus on community-sized institutions. We wish to provide this letter to you both to offer the perspective of an insurance tracker and to share observations we have made with the community lenders that we serve.

First, and primarily, we wish to express our concerns in relation to the proposed "safe harbor" provision. Overall, we have been and remain in support of the inclusion for a safe harbor provision in order for lenders to feel confident in accepting private flood insurance policies. However, it has largely appeared that any such provision is limited in scope by necessity given the wording of the law.

Use and Acceptance of a Compliance Aid

As it has been indicated in the proposed rule, there is an ultimate responsibility to accept policies that are considered to meet the definition of "private flood insurance" under the Biggert-Waters Act. In reading the proposed rule, we have perceived no current means to forgive any instances where this responsibility is not met, regardless of any compliance aid or

"safe harbor" provision. If the law truly does not provide for the Agencies to make such determinations then it would seem to immediately undermine the effort to create a safe harbor provision.

We recognize that the currently proposed safe harbor provision would at least create a legal responsibility on the part of the insurer, insofar as it relates to their duty to provide honest and accurate information. This may at least permit the lending institution to pursue civil damages in the event of any loss suffered as a result of relying on poor information from the insurer. While this may be satisfactory for larger institutions, however, we see this as a much more difficult route for community institutions to pursue reasonably.

In order for the safe harbor provision to be truly effective, we contend that it is necessary for it to provide genuine protection if a lender relies upon it in good faith. That is to say, if the lender accepts policies utilizing the safe harbor provision in good faith, and those policies are later found to fall short of their promised protections and the absolute requirements under the law, then that lender should be permitted to rectify the problem through the procedures that presently exist for instances where coverage is discovered to not exist or be insufficient. Ideally, no enforcement actions would occur against the lender unless it was not a case of good faith acceptance, there was some clear cause to refuse those policies initially, or corrective actions were not taken in a timely fashion upon discovery of the problem.

Conversely, there may be cases where the elements of the safe harbor provision are not included but the policy does meet the definition, as is also indicated in the proposed rule. Again, a larger institution may have the resources to manage this scenario effectively, but community lenders may easily find themselves at a disadvantage in this regard. We recognize that the language of the law provides little leeway to the Agencies, if any, in enforcing the requirement to accept policies that meet the private insurance definition.

The encouragement for insurers to include elements of the safe harbor provision, as it is provided in the proposed rule, relies on convenience for the mutual customer of the insurer and the lender. Because the insurer will be responsible for any statements made about coverage, a liability must be assumed by the insurer to include the safe harbor elements. Aversion to potential litigation on the part of the insurer, and the recognition that it is the lender alone who is at risk for refusing the policy, may hinder the development of this concept as a safe harbor.

It is certain the law was intended to provide more options for homeowners and business owners to meet flood insurance requirements, and to protect their ability to pursue these options. In so doing, Congress also provided the expectation that interested parties will be protected under a private policy in a manner that is similar to a policy issued under the National Flood Insurance Program (NFIP). It seems reasonable to expect that no intention existed to create a potentially greater risk for lenders through the law, particularly at the community level, but rather to ensure that both lenders and borrowers receive all due rights and protections.

It is our hope that the Agencies retain the authority to assess when enforcement actions are appropriate and where they may be unnecessarily detrimental. By permitting community lenders the capacity to accept policies with the final safe harbor elements and refuse those policies without them, all in good faith and without significant risk of being adversely affected, it should be more likely that insurers will find it necessary to include these elements. If not then the effort to create a safe harbor provision may be rendered ineffective. Insurers may hesitate to provide them on their policies, if only to avoid potential litigation despite their best efforts and

intentions. Without some protection for acting on the safe harbor provisions, or a lack of them, in good faith, lenders would have no real capacity to urge insurers to utilize them.

Design of the Compliance Aid

We support the proposed design for the compliance aid or "safe harbor" provision. We believe a summary would likely be very beneficial to someone less familiar with insurance at the time a mortgage is made, increased, renewed, or extended. We also support the inclusion of the proposed statement within the policy itself. We would recommend that it be sought to have this statement always included on the declarations page of the policy, though, rather than accept it elsewhere. We find that the most reasonable tracking methods rely on key documents from the policy, such as the declarations page. Seeking to include have the statement there always would likely avoid potential confusion or complication with insurance tracking when private policies appear.

We recognize that the proposed design of the safe harbor provision is only a desirable outcome, however, and that no requirement on insurance companies can be made through the Agencies or through the law as it is written. As is indicated within the proposed rule, developing the use of the safe harbor provision will rely on voluntary cooperation from the insurance companies. While it is our sincere hope that insurance companies will choose to support this universally, we see where some may be reluctant, as noted previously.

Therefore, we feel it is important to express again that the success of implementing this provision would rely on the ability to create a sufficient incentive to insurance companies that would generally overcome potential reluctance. Without direct requirements on the insurance companies, we believe this can only be achieved if lenders are able both to safely rely on the use of the provision in good faith, a positive incentive, and decline to accept policies without it in good faith, a negative incentive. While we must recognize that the law simply requires acceptance of policies that meet the definition for private flood insurance, we hope there remains some capacity for the Agencies to assess rejections of such policies on a case-by-case basis, as previously stated.

Definitions, Requirement to Purchase Flood Insurance, and Discretionary Acceptance

Overall, we support the remaining sections of the proposed rule as provided. The sole exception is our hope that the rule under the "Requirement to Purchase Flood Insurance" may be designed to reflect the aforementioned concerns and support good faith reliance on the proposed compliance aid. We also wish to state that we very strongly support providing the right to lending institutions to assess those policies that do not meet the definition of "private flood insurance" from the law on a case-by-case basis for the same reasons as provided in the proposed rule.

Sincerely,

Robert A. Smith
Compliance Risk Manager
Miniter Group