January 06, 2017

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

RE: Comments on Loans in Areas Having Special Flood Hazards-Private Flood Insurance

Dear Mr. Gerald Poliquin,

I am writing on behalf of the California and Nevada Credit Union Leagues (Leagues), one of the largest state trade associations for credit unions in the United States, representing the interests of 276 credit unions and their more than 10 million members/consumers.

Five agencies, including the National Credit Union Administration (NCUA), (collectively, the Agencies) jointly issued a proposal to amend their regulations regarding loans in areas having special flood hazards to implement the private flood insurance provisions of the Biggert-Waters Flood Insurance Reform Act of 2012 (Biggert-Waters Act).

The Agencies jointly issued proposed rules to implement the escrow, force placement, and private flood insurance provisions of the Biggert-Waters Act in October 2013. Based on comments received on the 2013 proposaland the statutory effective date for the escrow provisions, the Agencies decided to finalize the escrow and force-placed insurance provisions in 2015 and to revise and re-propose the private flood insurance provisions.

Specifically, this proposed rule would *require* regulated lending institutions to accept policies that meet the statutory definition of private flood insurance in the Biggert-Waters Act and *permit* regulated lending institutions to accept flood insurance provided by private insurers that does not meet the statutory definition of ‘‘private flood insurance’’ on a discretionary basis, subject to certain restrictions.

The Leagues welcome the opportunity to provide comments to the NCUA on the interagency proposal regarding private flood insurance. While we recognize that much of the proposal is required by statute, we have serious concerns with the implementing regulations, and we offer the following comments.

Definition of Private Flood Insurance

The Leagues recognize the proposed definition of “private flood insurance” is mandated by, and is substantively consistent with, the definition in the Biggert-Waters Act, with some clarifying edits.

The definition includes that the policy "provides flood insurance coverage that is *at least as broad as the coverage provided under a standard flood insurance policy (SFIP)*, including when considering deductibles, exclusions, and conditions offered by the insurer."

The Leagues agree with the proposed definition of SFIP to mean a standard flood insurance policy issued under the National Flood Insurance Program (NFIP) in effect as of the date the private policy is provided to a regulated lending institution.

The Agencies' proposed definition includes extensive clarification of when a policy is *"at least as broad as"* the coverage under a SFIP. While the Leagues agree with the clarifying edits, we believe it will be extremely difficult for credit unions to determine whether private flood insurance is compliant, particularly with respect to the *''as broad as''* requirement.

Mandatory Acceptance

The Biggert-Waters Act addresses the use of private flood insurance to satisfy mandatory flood insurance purchase requirements. The proposed rule requires credit unions to accept private flood insurance as satisfaction of the mandatory requirements, provided the policy meets the definition of private flood insurance and provides the mandatory coverage requirements.

The proposed rule places the responsibility of determining whether a private flood insurance policy meets the requirements and definition of "private flood insurance" directly on the credit union. The Leagues intensely oppose this requirement as it puts credit unions in an untenable position: a failure to accept a compliant private flood insurance policy would be considered a violation, while accepting a private policy that is later judged by an examiner to be noncompliant would also result in a violation.

Safe Harbor Needed

The 2013 proposal included a safe harbor provision that would have allowed lenders to rely on a State insurance regulator's written determination that a particular privateinsurance policy satisfies the rule's definition of ''private flood insurance'' and, therefore, must be accepted by the lender in satisfaction of the mandatory purchase requirement. The Leagues expressed concerns that no processes currently exist for States to make this determination and the costs to implement would likely be passed on to the insurers and ultimately the consumers. Further, we believe that a State insurance regulator may be reluctant, or even lack the legal authority, to certify that a private flood insurance policy complies with Federal law.

The Leagues also recommended in 2013 that the Agencies provide a safe harbor that allows insurers to certify, in writing, that a policy meets the minimum requirements for private flood insurance under the Biggert-Waters Act, and that a certification by an insurer be legally binding on the part of the insurer.

In response to all comments received to the 2013 proposal, the Agencies now propose a “compliance aid” provision to help credit unions determine whether a policy meets the definition of “private flood insurance.” This provision provides that a policy is deemed to meet the definition of ‘‘private flood insurance’’ if the following three criteria are met:

1. The policy includes, or is accompanied by, a written summary that demonstrates how the policy meets the definition of private flood insurance by identifying the provisions of the policy that meet each criterion in the definition, and confirms that the insurer is regulated in accordance with that definition;

2. The regulated lending institution verifies in writing that thepolicy includes the provisions identified by the insurer in its summary and that these provisions satisfy the criteria included in the definition; and

3. The policy includes the following provision within the policy or as an endorsement to the policy: ‘‘This policy meets the definition of private flood insurance contained in 42 U.S.C. 4012a(b)(7) and the corresponding regulation’’ (assurance clause).

While this compliance aid provision, when provided, may be helpful in reviewing policies, it falls short of providing a “safe harbor” and does little to mitigate the compliance burden: (1) Issuers are not required to provide the compliance aid; (2) Credit unions will need to acquire insurance underwriting expertise in order to comply with the second criterion, and (3) the third criterion does not guarantee recourse against the insurance company or relieve the credit union of liability should the policy prove not to comply with Federal law.

With or without the compliance aid, credit unions will have great difficulty in evaluating whether a flood insurance policy meets the definition of “private flood insurance” and therefore must be accepted. Credit unions will need to train or hire staff with insurance underwriting expertise or hire third-parties to conduct these reviews to determine if an insurance policy meets the definition of “private flood insurance.” This substantially increases credit unions’ compliance burden and costs. Members/borrowers will be negatively impacted as these increased costs will likely be passed on to borrowers as well as create a delay in the processing of their loans.

The Leagues agree with the first component of the “compliance aid.” However, we strongly recommend the “assurance clause” instead be a legally binding “certification” by the issuer. Credit unions should be afforded a safe harbor when relying on the issuer’s summary and certification, and the issuer should indemnify the credit union if the policy should prove not to comply with Federal law and result in a loss to the credit union.

Absent a written summary and certification, credit unions and other regulated lenders should be able to treat the policy as a discretionary acceptance policy.

Discretionary Acceptance

Under the discretionary acceptance section of the proposal, a credit union would be permitted to accept a private flood insurance policy that is not issued by NFIP and does not meet the definition of private flood insurance, if certain conditions are met.

The Leagues have concerns with the conditions that are *not* required for policies under the proposed discretionary acceptance provision. From a consumer protection perspective, we do not agree with the provisions that private flood insurance policies: (1) need not contain information about the availability of flood insurance coverage under the NFIP, and (2) provide consumers with a "reasonable notice" of cancellation (rather than a 45-day notice of cancellation or non-renewal).

As we commented in 2013, we propose the final rule include: (1) a requirement that the policy be clearly identified as not conforming to the statutory definition of private flood insurance and a notice regarding the availability of flood insurance coverage under the NFIP; and (2) a requirement for the insurer to provide "reasonable notice of not less than 45 days" in writing to the policyholder and the lender of cancellation or non-renewal.

Regulatory Flexibility Analysis Needed

The NCUA determined that the rulemaking does not require a Regulatory Flexibility Act (RFA) analysis. The RFA requires NCUA to prepare an analysis to describe any significant economic impact a regulation may have on a substantial number of small entities. For purposes of this analysis, NCUA considers small credit unions to be those having under $100 million in assets. The NCUA determined that as of June 30, 2016, there were 4,345 small, federally insured credit unions, and that about 2,894 of these credit unions have real estate loans. The NCUA then estimated that the average cost per small credit union is approximately $2,020 per year. Using this cost estimate NCUA believes the proposed rule will have a significant economic impact on 63 small credit unions, and that 63 is not a substantial number. Therefore, NCUA certified that the proposed rule, if adopted, will not have a significant economic impact on a substantial number of small entities.

The Leagues question NCUA's cost estimate of $2,020 per year. The NCUA does not define or explain how they arrived at this cost estimate, which is the basis for determining whether the total costs on small credit unions are significant. The Leagues encourage the NCUA to justify this cost estimate and provide an opportunity for credit unions to respond.

The Farm Credit Administration (FCA) certified that none of the institutions in the Farm Credit System are "small entities" as defined in the Regulatory Flexibility Act (RFA) and therefore an analysis by the FCA is not required.

The Federal Reserve System (Board) estimates costs per small entity of $8,096 during the first year; the Federal Deposit Insurance Corporation (FDIC) estimates

costs of $2,020 - $4,500 each year per small entity; and the Office of the Comptroller of the Currency (OCC) estimates costs of $10,400 each year per small entity[1]. These varying estimates are concerning. While the FRB and the FDIC provide some justification for their cost estimates, the OCC, like the NCUA, provides none.

Both the Board and FDIC include an assumption of "one labor hour per year, per policy, at $101 per hour"[2] in their cost estimates. As discussed above, evaluating whether a flood insurance policy issued by a private insurer meets the definition of ''private flood insurance'' under the mandatory acceptance provisions will be a complex and burdensome undertaking. The Agencies believe that the proposed "compliance aid" will help to mitigate that burden.

The Leagues believe that comprehensive training will be required by a sufficient number of staff at each credit union to learn how to perform such an evaluation, with and without a "compliance aid." These training costs should be included in first year estimates. Further, evaluations and determinations conducted on private flood insurance policies that do not include a "compliance aid" will take far longer than one hour. The Leagues recommend, absent a mandatory use of a compliance aid, the cost estimates be revised to include a minimum of three labor hours per year, per policy.

Conclusion

In conclusion, the Leagues have great concerns with the compliance burden and costs this proposed rule will impose on credit unions. We strongly urge the Agencies provide a real safe-harbor by requiring issuers of private flood insurance policies to include a written summary and a certification for mandatory acceptance policies and that the certification be legally binding on the insurer. Additionally, discretionary acceptance policies should include additional consumer protection notices and provisions.

We also encourage the NCUA to justify their cost estimates and provide an opportunity for comment. We disagree with the other Agencies' cost estimates based on one labor hour per year, per policy, and we recommend a minimum estimate of three hours per year, per policy.

We thank you for the opportunity to comment on the proposal and for considering our views.

---

[1] The Farm Credit Administration (FCA) certified that none of the institutions in the Farm Credit System are "small entities" as defined in the Regulatory Flexibility Act (RFA) and therefore an analysis by the FCA is not required.

[2] 81 FR 78063; footnotes 26 and 31

Sincerely,

Diana Dykstra
President and CEO
California and Nevada Credit Union Leagues

cc: CUNA, CCUL