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January 6, 2017

Legislative and Regulatory Activities
Division
Office of the Comptroller of the Currency
400 7th Street SW, Ste. 3E-218
Mail Stop 9W-11
Washington, D.C. 20219
Docket ID OCC-2016-0005
Regs.comments@occ.treas.gov

Robert deV. Frierson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551
Docket No. R-1549
Regs.comments@federalreserve.gov

Robert E. Feldman, Executive Secretary
Attn. Comments / Legal ESS
Federal Deposit Insurance Corporation
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Washington, D.C. 20429
RIN 3064–AE50
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Office of Regulatory Policy
Farm Credit Administration
1501 Farm Credit Drive
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Gerard Poliquin, Esq.
Secretary of the Board
National Credit Union Administration
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RE: ASFPM's Comments on Loans in Areas Having Special Flood Hazards – Private Flood Insurance Joint Notice of Proposed Rulemaking
Docket ID: OCC-2016-0005

Dear Sir or Madam:

The Association of State Floodplain Managers (ASFPM) is pleased to submit comments on the joint notice of proposed rulemaking (JNPRM) to amend rules regarding loans in areas having special flood hazards to implement private flood insurance provisions of the Biggert-Waters Flood Insurance Reform Act of 2012 (BW-12). ASFPM, a professional non-profit, represents 36 chapters and more than 17,000 state and local officials, as well as the private sector and other professionals engaged in all aspects of flood risk management and flood hazard mitigation. All ASFPM members are concerned with reducing our nation's flood-related losses. For more information on the association, its 14 Policy Committees and 36 state chapters, visit www.floods.org.

Legislative Context of the Private Flood Provisions of BW-12 and the Role of Flood Insurance as an Element of the NFIP

The National Flood Insurance Program (NFIP) is a national, comprehensive flood risk management program that includes a flood insurance component. The earliest reports on legislation leading up to the passage of the National Flood Insurance Act of 1968 underscore the interrelated elements of the program we have today:

> *S. 1985 would authorize a national program under which flood insurance can be made available to occupants of flood-prone areas through the cooperative efforts of the Federal Government and the private insurance industry . . . The facilities of the private insurance industry would be fully utilized in carrying out the program. . . A most important public purpose which the program will serve to encourage State and local governments to adopt and enforce appropriate land use provisions to restrict future development of land which is exposed to flood hazard. . .The program will expand as additional areas with special flood hazards are identified, actuarial rates required in these areas are determined, and as appropriate land use controls are adopted.*[1]

A Congressional finding from the National Flood Insurance Act of 1968 states that:

> *The objective of a flood insurance program should be integrally related to a unified national program for floodplain management.*

Congress required the Agencies to consider flood policy concerns other than merely flood insurance. The Flood Disaster Protection Act of 1973 (a revision to the National Flood Insurance Act of 1968) required that several agencies, including agencies that regulate financial institutions, "shall, in cooperation with the Administrator, issue appropriate rules and regulations to govern the carrying out of the agency's responsibilities under this Act."

Our point is that the NFIP is not just an insurance program. For more than 40 years until about 2010, there has been widespread acknowledgement and support for this integrated approach. Yet in the time leading up to BW-12 and since then there have been efforts to solely focus on transforming the insurance side of the program with NO regard to the other essential components.

Because these different policies are intertwined, ASFPM urges the Agencies, working with FEMA, to consider flood policies broadly in this rulemaking, rather than considering private flood insurance in isolation.

What then was the Congressional intent of BW-12 and the 2014 reforms as part of the Homeowners Flood Insurance Affordability Act (HFIAA)? With BW-12 Congress tried to achieve multiple goals. First was to strengthen the flood mapping program. Second was to put the NFIP on a much more sound financial footing by putting most policies on a path to actuarial rating, creating a reserve fund, and allowing for the NFIP to purchase reinsurance. Third was to facilitate greater involvement by private insurers. **ASFPM believes that the Congressional intent of BW-12, inclusive of Section 100239, was to not only stimulate the private flood insurance market, but to ensure that the NFIP itself remained strong.**

These two points are the backstop upon which our remaining comments rest.

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[1] Report 549: *National Flood Insurance Act of 1967: Report of the Committee on Banking and Currency United States Senate to accompany S. 1985*. August 29, 1967

Definition of Private Flood Insurance

It is quite clear by the definition of private flood in Section 100239 of BW-12, that Congress wanted to be very specific in terms of how private flood policies to meet the mandatory purchase requirement of the NFIP were envisioned. **ASFPM is pleased that the proposed rule adopts a definition substantially similar to that which was defined in law and supports the clarification of "at least as broad as" to specifically include Increased Cost of Compliance (ICC). Further we want to emphasize the importance of other aspects of the definition including those that require notification (consumer protection), the mortgage interest clause (protecting lenders investment), and similar coverages with limits on deductibles and exclusions (consumer and taxpayer protection).**

Some claim that further changes in the law are needed, in particular with regard to the definition of private flood, so that private insurers can begin writing flood insurance policies to meet the mandatory purchase requirement, we feel it is important to report that there is a nascent but thriving and expanding private flood insurance market, under today's laws and even in the absence of these proposed rules. This was evident at the 2016 National Flood Conference where several of these providers were present and advertising their services and at a post-conference briefing that ASFPM members participated in. This developing market is in addition to the thriving private flood insurance market that has been in existence for some time providing coverage in excess of NFIP limits, forced place coverage, and commercial/industrial coverage.

Requirement to Purchase Flood Insurance

Using the same logic that the agencies propose elsewhere in this rulemaking that in the absence of a Congressional prohibition, ASFPM is proposing two ideas for inclusion into a final rule: 1) An equivalency fee be required for every private flood insurance policy required to meet the mandatory purchase requirement and 2) In order for a private policy to written for a property subject to the mandatory purchase requirement, the community must participate in the NFIP.

The Federal Policy Fee that is assessed on NFIP policies provides resources for a substantial portion of FEMA's floodplain mapping budget, and FEMA's entire floodplain management budget. Because this rulemaking specifically concerns private flood alternatives to meet the mandatory purchase requirement, we request that it be made a requirement that private policies *include a fee equivalent to* the federal policy fee to help continue to pay for floodplain mapping and floodplain management standards/programs which are used by private insurers. If nothing else, the mere presence of the mandatory purchase requirement presupposes that there is a zone – which is shown on the FEMA flood map –where such requirements exist. Simply put, private insurers benefit from the mandatory purchase requirement which is based on FEMA flood maps. The NFIP is put at a competitive disadvantage as private policies would do not have to include such a fee and ASFPM believes that not having this fee will weaken the NFIP overall.

To participate in the NFIP, a community must adopt land-use standards that regulate construction in identified flood hazard areas. Of the 22,000 communities in the NFIP, over 6,000 of them have not adopted any other land-use or building standards beyond those to participate in the NFIP. ASFPM is very concerned (and this concern is shared widely by state floodplain managers) that an increased offering of private flood insurance without the requirement that a community participate in the NFIP will lead to many of them dropping out of the NFIP altogether. The nation's floodplain managers are in the best position to understand a community's motivations for joining the NFIP, our state members have helped nearly all of them join the program. Quite simply, communities join to have access to flood insurance. While there are other incentives and disincentives for participation, none of them rise to the level of prominence as the simple availability of flood insurance. If there is not a provision that requires community participation in the NFIP before a private flood policy is

acceptable under the mandatory purchase provision, several thousand communities will end up dropping out of the NFIP further burdening taxpayers and resulting in more at-risk development in flood hazard areas.

Compliance Aid for Mandatory Acceptance

The approach as proposed seems to be pragmatic and helpful. While ASFPM is not directly affected by this provision, many of our members interface with property owners that are purchasing and financing development subject to the mandatory purchase requirement. **ASFPM thinks it would be helpful; however, for the agencies to clarify and be very clear that even if a private policy does meet the statutory definition; investors, lenders, and servicers may reject the policy if it is inadequate for any safety and soundness reason.**

Discretionary Acceptance

ASFPM is strongly opposed to the entire concept of discretionary acceptance as proposed and disagrees with the interpretation in the proposed rule that the statute is silent about whether a regulated lending institution may accept a flood insurance policy issued by a private insurer that does not meet the statutory definition. There are at least four references in the NFIA as amended by BW-12 to the acceptance of private flood policies provided the insurance meets the requirements *for coverage under such subparagraph* (emphasis added). We cannot interpret this as anything but needing to meet the definition (which contain the requirements) of private flood. While the Congressional intent of Section 100239 was to stimulate the private flood insurance market; it was in the context of also strengthening the NFIP and there is nothing that can neither be inferred or specified in the bill that there was any other intended approach save for the one that was carefully spelled out by Congress. As an organization that participated significantly in debates and discussions of BW-12, we also note that there were earlier proposals that ultimately did not make it into the law that were less prescriptive in defining private flood insurance. Certainly if it were the intent of Congress to have such a mechanism like discretionary acceptance, it would have been passed into law or the flexibility to do so would have been much more apparent.

It appears that the discretionary acceptance approach is not unlike that proposed in HR 2901 which passed the House in 2016, and would enable a pathway where surplus and excess line carriers could write private flood under the supervision of state insurance regulators. ASFPM continues to be concerned about this approach because of inadequate oversight. State regulation of surplus and excess lines is not what is commonly thought of as insurance regulation (meaning there would be meaningful consumer protections such as regulating rate and form) rather it almost entirely focuses on the insurance company's financial condition.[2] We are not aware of any proposals to adequately regulate these types of policies should they come under the auspices of the state and have significant concerns in terms of impacts to consumers, communities, and taxpayers.

Conclusion

Congress will need to reauthorize the NFIP in 2017 and there are certain to be more proposals considered related to the role of private flood insurance. ASFPM believes that there is an appropriate role for private flood insurance in the overall scheme of the NFIP and also believes that whatever that role is, it can co-exist with a strong NFIP. Please do not hesitate to contact Chad Berginnis, Executive Director at cberginnis@floods.org with any questions or comments.

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[2] A good explanation of E&S Insurance can be found here: http://www.aamga.org/faqs. This site indicates that excess and surplus lines are not bound by most of the rate and form regulations imposed on standard market companies which allows them the flexibility to change the coverage offered and the rate charged without the time constraints and financial costs associated with the filing process.