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December 10, 2013

Agency Name: OCC - Docket ID: OCC-2013-0015
By electronic delivery to:

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Re: Loans in Areas Having Special Flood Hazards; RIN 1557-AD67; RIN 7100AE-00; RIN 3064-AE03; RIN 3052-AC93; RIN 3133-AE18
Docket ID: OCC-2013-0015

Ladies and Gentlemen:

Poulton Associates Inc. is located 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 4,000 independent insurance production offices. Under the NCIP, the perils of flood, earthquake and landslide may be insured for both personal and commercial properties through Certain Underwriters at Lloyds (London).

In response to the proposed rule and the specific requests for comments contained in the joint notice of proposed rulemaking, we provide what follows in addition to our verbal comments made previously.

Summary Comments

The stated intent of Section 100239 of the Biggert-Waters Flood Insurance Reform Act of 2012 is to assure the widespread availability of privately underwritten flood insurance.

The purposes of section S100239 can be most reasonably achieved by altering the proposed safe harbor provision so as to provide two safe harbor options when considering the acceptability of a private flood policy. We suggest that the following two safe harbor provisions be used to facilitate the acceptance of privately underwritten flood insurance by lenders. The first of the two provisions will allow for mandatory acceptance by lenders as currently contemplated by the joint notice. The second of the two provisions will allow for discretionary acceptance by lenders as currently contemplated by the Act and as inferred in the joint notice.

Safe harbor for mandatory acceptance. Acceptance by a lender of a flood insurance policy shall be mandatory if the flood insurance policy is deemed to meet the definition of private flood insurance in §339.2(i) for purposes of paragraph (a) of this section if a State insurance regulator makes a determination in writing that the policy meets the definition of private flood insurance in §339.2(i), or;

Safe harbor for discretionary acceptance. Acceptance by a lender of a flood insurance policy shall be at the discretion of the lender if the flood insurance policy meets the limits of insurance requirements in §339.3 for purposes of paragraph(a) of that section, and; 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; if 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 contains these dual safe harbor provisions will effectively and immediately open the door to increase private sector participation in the national flood insurance market as intended by Congress. It will enable new actuarial assumptions, underwriting paradigms and private capital into the flood insurance market that will drive down costs for consumers. In turn, it will have a far-reaching impact in ensuring the continued sustainability of the National Flood Insurance Program and it will begin a process that will ultimately remove massive amounts of flood risk from tax payers.

By implementing these two safe harbor provisions, the Agencies will not only allow consumers a choice, they will allow consumers a choice that comes with recourse to state market conduct regulatory protections as well as the right to obtain justice, when necessary, by accessing state and local courts; avenues not practically available to those insured by the NFIP.

Expanded Comments

The House Committee Report on the 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 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 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. 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 final regulation should as described in the joint notice, "require that regulated lending institutions accept private flood insurance that meets the statutory definition to satisfy the mandatory purchase requirement."

Any attempt to achieve agreement on the part of multiple insurance experts as to a state compliant flood insurance policy being "as broad as or broader than" a non-state compliant self-regulated NFIP policy, especially in light of the other problematic aspects of the definition, will prove very difficult. Any effort to obtain even a minimally uniform interpretation of the definition on the part of 50 or more insurance experts or even a small committee of experts will take a great deal of time if it proves to be achievable at all.

It will likely take several years for a clear path to mandatory acceptance under the definition to emerge and there may never be a private insurance policy that is judged to be "as broad as or broader than" an NFIP insurance policy. This will not be caused by any perception that the NFIP

policies are better than private insurance policies but it will derive from the inconsistency and vagaries of the definition as well as the paradox inherent in attempting to force an insurance contract that must conform to state laws to comport in large measure with a self-regulated NFIP insurance contract that does not conform to state laws and does not track with insurance industry practices and procedures. Indeed, the NFIP insurance policy in its current form would almost certainly be disallowed for sale in all 50 states if it were under state jurisdiction.

In order to fulfill the purpose of Section 100239, by utilizing the definition of private flood insurance to create a mandatory acceptance mechanism, it is important that the Agencies not allow any part of the definition to be added to the discretionary acceptance criteria already stipulated in the Act. The viability of a mandatory acceptance provision will depend on the implementation of a discretionary acceptance provision which avoids the numerous problems with implementing subjective criteria such as those found in the definition.

Only the use of eminently recognizable objective criteria in any discretionary acceptance provision will provide the path to the certainty necessary for regulated lending institutions to accept privately underwritten flood insurance policies that do not meet the statutory definition of private flood insurance. We believe strongly that this provision will need to be free from the imposition of any criteria beyond that already contemplated by the Act if it is to provide the required certainty.

Regulators should, as described in the joint notice; "include a provision in the final regulations that expressly permits regulated lending institutions to accept a flood insurance policy issued by a private insurer that does not meet the Act's definition of 'private flood insurance' to satisfy the FDPA's general mandatory purchase requirement."

Without the inclusion of this provision in the final rule, the purpose of Section 100239 will be completely frustrated and the status quo will simply be reinforced by the other provisions being considered by regulators. The Act affirms the right of a lender to accept any private policy that is properly sold in conformity with any applicable state laws and regulations and is in conformity to the limits of insurance criteria and financial strength and claims paying ability criteria requisite under the Act.

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. Nowhere in the Act are existing rights of lenders to accept private insurance policies abridged in any way.

The importance of a viable implementation of this provision cannot be over-emphasized in our opinion.

Regulators should not, as described in the joint notice; "include a provision in the final rules that specifically requires regulated lending institutions to accept only policies issued by private insurers that meet the statutory definition."

We do not believe that this position is intoned by the language of the Act. Based on our experience and as expanded upon in our verbal comments, we are certain that such a provision will simply reinforce and maintain the status quo.

If this position were intended by Congress, they would have made specific changes to the McCarran-Ferguson act reclaiming federal jurisdiction over all privately underwritten flood insurance. Additionally, they would have made reasonable provisions concerning who would be responsible for adjudication of the definition, funding for administration and adjudication of the provision as well as providing for an extended time frame and pathway to realization of such a provision.

One of the aspects of the Act that confirms this view is that had Congress intended all flood insurance to comport with the definition, we believe they would have amended the requirement to purchase "flood insurance", as used in the Act, to read "private flood insurance." They did not do so. Not all flood insurance should be required to comply with the definition of private flood insurance found in Section 100239.

If the Agencies decide to include a provision in the final rules that expressly permits regulated lending institutions, at their discretion, to accept policies issued by private insurers that do not meet the statutory definition of "private flood insurance" to satisfy the mandatory purchase requirement, they should not, impose any criteria beyond those already provided for in the Act.

It does not appear to us that any part of the authority to regulate private insurers conveyed to the states under McCarran Ferguson has been conveyed to the Agencies by the FDPA. Therefore, it does not appear to us that the Agencies have the necessary authority to impose any additional criteria beyond those already provided for in the act. The Agencies acted as though they had such authority in the past in the way they utilized the NFIP private flood insurance guidelines and it has not turned out well.

All of the standards needed to assure that such privately underwritten flood insurance policies will serve the purposes of the Act, fully comply with state insurance statutes and regulation and be issued by only financially strong insurers are contained in the Act.

- 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 potentially violate McCarran Ferguson by overreaching 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 the first two of 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 the first two of these three criteria been respected as the only proper federally required criteria relative to satisfaction of the mandatory purchase requirement in years past, there likely would have been no need for Congress to create section S100239 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 by private flood insurers 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 required by lenders or regulators.

Implementation of this position, 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 this purpose.

The creation of any additional criteria will have the same negative effect as the NFIP Private Flood Insurance guidelines have had; they will introduce uncertainty for lenders who will react by continuing to reject all private flood insurance and accept only NFIP insurance. It will likely take several years for a clear path to mandatory acceptance under the definition to emerge and there may never be a private insurance policy that is judged to be "as broad as or broader than" an NFIP insurance policy because of the vagaries of the definition and the paradox inherent in attempting to force an insurance contract that must conform to state laws to comport in large measure with a self-regulated NFIP insurance contract which does not conform to state laws.

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 so as 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 guidelines.

The Agencies describe several criteria beyond those already provided for in the Act that the Agencies trust "may authoritatively be imposed" upon policies issued by private insurers that do not meet the statutory definition of private flood insurance. All of our previously asserted

objections to such additional criteria are reasserted against these specific items; however, we wish to provide comments on the specific criteria for your consideration.

There is no need for the Agencies to implement the requirements enumerated as “First”, “Second” and “Finally” on pages 25 and 26 of the joint notice as each one of the enumerated additional requirements is already provisioned for, or mandated and enforced under, state laws and regulations except in the case of the stipulated mortgagee provision which is easily required at the sole discretion of the lender already.

As described in the “First” possible requirement, “the Agencies could require that flood insurance issued by a private insurer that a regulated lending institution may accept at its discretion must be issued by an insurer that is licensed, admitted, or otherwise approved to engage in the business of insurance in the State or jurisdiction in which the insured building is located by the insurance regulator of the State. Further, in the case of a policy of difference in condition, multiple peril, all risk, or other blanket coverage insuring nonresidential commercial property, the Agencies could require that the private insurance provider must be recognized, or not disapproved, as a surplus lines insurer by the insurance regulator of the State or jurisdiction where the property to be insured is located.” Such a requirement is needless and would be redundant because each of the requirements described is already required of any entity wishing to legally issue such a property insurance policy in each and every state. If implemented, such a provision would create uncertainty on the part of lenders just as it has in the past as part of the NFIP guidelines.

As described in the “Second” possible requirement, “the Agencies could require that the coverage provided under any flood insurance policy issued by a private insurer that a regulated lending institution accepts at its discretion must be at least as broad as the coverage provided by a SFIP under the NFIP, including when considering deductibles, exclusions, and conditions offered by the insurer. For example, the private flood insurance policy must provide coverage for the foundation of a building in addition to the above-ground portion of the building. This criterion could ensure that a private flood insurance policy accepted by a regulated lending institution provides the institution and the borrower with appropriate and sufficient coverage for the property securing the loan.”

Unlike the NFIP, private insurers are already subject to statutes and regulations, in each and every state, that require them to act in good faith when issuing insurance policies and when adjusting claims. State insurance commissioners may disallow any policy form they deem improper and have significant ability to assure fair and equitable settlement of claims. We are unaware of any privately underwritten primary flood insurance policy that disallows coverage for foundations. If such an insurance policy is allowed for sale in any state, in the event that the insurer attempted to enforce such a provision they would almost certainly be disallowed from denying coverage for the foundation(s) by the state insurance department. However, if regulators feel compelled to add such a condition to the criteria, it should be as objective as possible and couched in language such as; “shall not contain an exclusion of coverage for building foundations for the peril of flood.”

As “Finally” described in the last possible requirement, “the Agencies could require that any flood insurance policy issued by a private insurer that a regulated lending institution accepts at its discretion must include a mortgage interest clause similar to the clause contained in a SFIP. Therefore, the Agencies could require the mortgage interest clause to cover the interests of both the insured (whether such insured is a mortgagor/borrower or another entity that purchased the policy, such as a condominium owners' association) and the mortgagee (the lender). Having both the insured and the mortgagee covered in the mortgage interest clause would mean that, in the event of a loss, the interests of both the regulated lending institution and the insured would be protected.”

We know of no mortgage interest clause in use by any private insurance company that does not provide for “the interests of both the regulated lending institution and the insured” to be protected. Certain “force placed” flood insurance policies, (improperly in our opinion), exclude the interest of the insured but that is the result of the policy being written for only the interest of the mortgagee; there is no mortgage interest clause such as is being considered here in these policies.

The lender will, and always has been, the entity that requires a satisfactory mortgage interest clause in any property insurance policy contemplating the collateral of a loan. Lenders do not need any additional authority to require such a clause. Again, we are certain that state insurance regulators have not and would not allow an insurer to benefit from a mortgage interest clause that does not retain coverage for the named insured. By definition, the insured’s interests are insured by the policy; a mortgagee clause simply adds the mortgagee’s interests “as they may appear” at the time of loss to be considered in the paying of a claim.

Requiring any of the above criteria, except perhaps the un-needed mortgage interest clause criteria, for any flood insurance policy issued by a private insurer that a lender accepts at its discretion will create a measure of uncertainty. The lender will wonder why such a regulation was issued. They will attempt to get greater clarity on the intent of such provisions and refuse all private insurance if and until they are absolutely certain that they are in no danger of being held blameworthy by regulators based on accepting a private policy etc. Any such provisions will impede and discourage development of the private flood insurance market to the extent that they insert uncertainty into the regulation. Such criteria are needless, confusing and redundant when considered in the light of existing State regulation and industry practice with respect to privately issued flood insurance.

Such additional criteria should not be imposed if the Agencies permit regulated lending institutions to accept private insurance policies issued by a private insurer that do not meet the statutory definition of private flood insurance. State regulators are more than equal to the task of regulating flood insurance just as they are relative to the many other types of property insurance which they oversee. Just as there is no need for additional requirements to be promulgated by lending regulators concerning the discretionary acceptance of homeowners insurance; they are not needed relative to the discretionary acceptance of flood insurance.

The Agencies also seek comment regarding the experience of both lenders and their borrowers with respect to policies issued by private insurers that do not meet the statutory definition of "private flood insurance" as compared to policies issued by private insurers that meet the statutory definition of "private flood insurance."

If there is a private insurance policy written to insure the peril of flood that enjoys universal acceptance as meeting the conditions of the definition of “private flood insurance,” we are not aware of it. Our policy form has been accepted as complying by some and rejected as not complying by others. This is, of course, not surprising given the fact that there has been, and currently remains, no entity authoritatively designated to adjudicate the compliance or noncompliance of an insurance policy with what has been designated as the definition of private flood insurance.

Our observation is that any flood insurance policy might be judged as complying with the definition or be judged as not complying depending on the background of the adjudicator, the methodology chosen to perform the evaluation and its application to the very subjective, and sometimes, flawed components of the definition. As we observed in our verbal comments, we have seen many puzzling interpretations of the definition by bank examiners who were acting in good faith but in the absence of any expertise or appropriate context to make such a judgment. We could fill many pages with examples of nonsensical interpretations of the NFIP guidelines to which we have been subject over the past decade and provide examples of how intractable the definition is to its purpose.

Consider, for example, the rejection of a previous version of one of our flood insurance policies by multiple banks and bank examiners who cited as the basis for rejection the fact that it allowed the insured to file legal action against us without any time limitation after the denial of a claim. This was seen by the examiners as being out of compliance with the one year limitation for filing legal action required by what were then the NFIP guidelines and are now the definition. While this interpretation was against the interests of the consumer and benefited only the insurer, they were technically correct in considering our policy as out of compliance. But, in our opinion, they were wrong to take a position that would needlessly penalize innocent consumers based on an obvious flaw in a definition that was intended to protect them. To comply with regulatory edicts, we reluctantly limited the applicable time frame to one year in our policy. This is just one of many examples of seemingly irrational interpretations of the definition we have seen.

Consider another provision that will cause great difficulty for any person or group trying to apply the definition to its purpose;

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 be in compliance with 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” or “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 which contains the basis upon which the policy may be cancelled; you 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 all 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 we notify 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 and still be within state regulatory boundaries. It does have some justification as a component of a

discretionarily acceptable private insurance policy for the peril of flood only; we can provide further detail as to why it should be specifically limited to the peril of flood if the Agencies would like us to do so. This provision was developed to be used in flood insurance policies but not other types of property policies/perils and if implemented 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 what will result from 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 some private insurance contracts

Other provisions of the definition have similar incongruous characteristics to those which 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.

The Agencies should issue a final rule which serves to promote and increase the participation of private insurers in the flood insurance market. An effective rule will:

Restrict use of the definition of "private flood insurance" contained within the Act to its' use as a limiting restraint relative to the rejection of private insurance by lenders.

Encourage the discretionary acceptance of privately underwritten flood insurance by making no additional requirements for acceptance other than the limits of insurance and financial strength and claims paying ability provisions in the Act and the universal requirement that the insurance policy must be legally allowed for sale in the applicable state.

Leave with state insurance regulators the responsibility for regulating privately issued flood insurance to the maximum extent possible.

Utilize a two part safe-harbor similar to, or identical to, the safe harbor provisions found in the Summary Comments portion of this document which in the first instance will allow a private flood insurer to require lender acceptance of its flood insurance policies and, as an alternative,

in the second instance, will allow private insurers to submit to the discretionary acceptance by lenders of their flood insurance policies. In our view this two part safe harbor approach is an comprehensive answer to all of the questions and considerations concerning Section 100239 contemplated within the joint notice as long as it is clear to lenders that they may be they will be in no danger of any penalty if they exercise their right of discretionary acceptance and it is apparent to them that the Agencies fully support the discretionary acceptance of privately underwritten flood insurance. We see the regulatory articulation of this "two options for acceptance" safe harbor paradigm as the best mechanism to achieving the purposes of Section 100239.

Respectfully,

Craig K. Poulton CIC, CEO
Poulton Associates, Inc.