December 21, 2016

By electronic delivery to:

Legislative and Regulatory Activities Division
Office of the Comptroller of the Currency
400 7th Street, S.W., Suite 3E-218
MAIL Stop 9W-11
Washington, D.C. 20219
Regs.comments@occ.treas.gov

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

Robert deV. Frierson
Secretary
Board of Governors of the Federal Reserve System
20th and Constitution Avenue, N.W.
Washington, D.C. 20551
Regs.comments@federalreserve.gov

Gerard Poliquin
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314-3428
regcomments@ncua.gov

Robert E. Feldman
Executive Secretary
Attention: Comments/Legal ESS
Federal Deposit Insurance Company
550 17th Street, N.W.
Washington, D.C. 20429
Comments@FDIC.gov

Re: Loans in Areas Having Special Flood Hazards – Private Flood Insurance, Docket ID OCC-2016-0005, RIN 3133-AE64

Ladies and Gentlemen:

American AgCredit (the "Association") is part of the Farm Credit System ("System") serving customers living in rural areas and communities such as farmers, ranchers and rural home owners. We appreciate the opportunity to comment on the proposed rule published in the November 7, 2016 Federal Register addressing requirements for accepting private flood insurance policies for loans in areas having special flood hazards (the "2016 Proposed Rule").

The Association is committed to ensuring that its owner-borrowers implement appropriate risk management strategies. Additionally, we must be certain that any collateral securing loans is adequately protected from damage or loss. To that end we are strong proponents of flood insurance when appropriate.

I. Background and Summary of Comment

Prior to the enactment of the Biggert-Waters Flood Insurance Reform Act of 2012 ("Biggert-Waters Act"), System institutions were **permitted** (but not required) to accept private flood insurance if such insurance met the criteria set by the Federal Emergency Management Agency ("FEMA") in its

Mandatory Purchase of Flood Insurance Guidelines ("FEMA Guidelines"). The FEMA Guidelines contained onerous requirements, not the least of which was the requirement that the lender determine that the private flood insurance policy coverage is "at least as broad as the coverage under the SFIP [Standard Flood Insurance Policy issued pursuant to the National Flood Insurance Program]." Consequently, private flood insurance policies were rarely accepted because the regulatory compliance burden was too great.

In 2012, the Biggert-Waters Act made the acceptance of private flood insurance **mandatory** if the policy met certain criteria. Fortunately, the mandate was conditioned upon the issuance of final regulations, *which still have still not been issued.*

In 2013, FEMA rescinded the FEMA Guidelines, leaving System institutions with *no guidelines whatsoever* for acceptance of private flood insurance. That same year the OCC, FRB, FDIC, FCA and NCUA (the "Agencies") jointly issued a proposed rule regarding the acceptance of private flood insurance. That proposed rule was never finalized. Lenders, borrowers and private flood insurers were extremely frustrated. Borrowers and private flood insurers hounded lenders to accept private flood insurance policies and exclaimed that the Biggert-Waters Act had made acceptance mandatory, *which is still not yet the case*. Worse, the discretionary acceptance criteria that had been set forth in the FEMA Guidelines, onerous as they were, no longer existed.

For System institutions, the FCA came to the rescue in 2015 two days before Christmas with the issuance of an Informational Memorandum that essentially replaced the FEMA Guidelines with simple, straightforward and easy-to-administer criteria. In a nutshell, as long as the policy is legally issued by a licensed insurer in the minimum amount required, it may be accepted without fear of regulatory sanction. System institutions rejoiced, updated their procedures, and counted their blessings.

Sadly, the 2015 FCA Informational Memorandum is explicitly valid only *until FCA adopts final regulations implementing the private flood insurance provisions of Biggert-Waters.* The 2016 Proposed Rule now threatens to end our ability to conduct business with any form of efficiency for our customers requiring flood insurance.

As the Agencies promulgate rules to implement the private flood insurance requirements of the Biggert-Waters Act, we urge the Agencies to be mindful of the need for regulations that work for both consumers and federally regulated lenders and servicers (collectively, "lenders"). Compliance with the mandatory purchase requirement is among the most challenging compliance obligations we face on a daily basis, and Biggert-Waters Act implementation is adding significantly to these challenges. Care must be exercised to write rules that can be administered without having to send each tendered private insurance policy out to a consultant to examine and deliver a costly expert opinion.

II. Recommendations for Implementation of Biggert-Waters Mandatory Acceptance of Private Flood Insurance

A. Definition of "Private Flood Insurance"

We understand that the definition of "private flood insurance" included in the 2016 Proposed Rule is mandated by the Biggert-Waters Act and that, therefore, the Agencies may not make substantive changes to this definition. Nevertheless, requiring lenders to evaluate private flood insurance policies for compliance with the statutory definition puts them in the untenable position of being sanctioned if they reject a compliant policy and sanctioned if they accept a non-compliant policy all the while being unable

to determine whether a policy is compliant or non-compliant without spending considerable sums obtaining expert review and advice with respect to each policy submitted, on a case-by-case basis.

"At least as broad as." The most vexing requirement of the definition of "private flood insurance" is the requirement that the policy provide coverage that is "at least as broad as" the coverage provided under the SFIP. In the 2016 Proposed Rule, the Agencies have proposed to clarify the meaning of this phrase by breaking it down into the following requirements:

> (1) The term "flood" in the private policy must include the events defined as a "flood" in an SFIP;
> (2) The policy must cover both the mortgagor(s) and the mortgagee(s) as loss payees;
> (3) The policy must contain the coverage provisions specified in an SFIP, including those relating to building property coverage; personal property coverage, if purchased by the insured mortgagor(s); other coverages; and the increased cost of compliance;
> (4) For any total policy coverage amount up to the maximum available under the NFIP at the time the policy is provided to the lender, the policy must contain deductibles no higher than the specified NFIP maximum for the same type of property, and include similar non-applicability provisions as under an SFIP;
> (5) The policy must provide coverage for direct physical loss caused by a flood and may exclude other causes of loss identified in an SFIP; any additional or different exclusions than those in an SFIP may only pertain to coverage that is in addition to the amount and type of coverage that could be provided by an SFIP; and
> (6) The policy must not contain conditions that narrow the coverage that would be provided in an SFIP.

While we appreciate that the Agencies have made a good faith attempt to respond to comments previously made regarding the difficulty posed by the "at least as broad as" criterion, the Agencies' proposal to narrow it down to "just" the above-listed six criteria continues to put an inordinate burden on lenders. Specifically, under the proposed rule, lenders would be required to develop and maintain an expertise with respect to the coverage afforded in SFIP policies, as amended from time to time, review every private policy tendered, word for word, and compare it to the applicable SFIP policy form, or, alternatively, pay outside experts to examine each private policy that is tendered for approval.

The Association joins with prior commenters in asking for a safe harbor in the form of insurer certifications that their policies satisfy the statutory definition as the same may be clarified by applicable regulations. Indeed, it is the insurers, not the lenders, who are the experts in this area and far better equipped to make this determination.

The proposed "compliance aid". In the 2016 Proposed Rule, the Agencies have offered a "compliance aid" whereby a policy would be 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 the policy 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).

We appreciate the Agencies' attempt to address lenders' concerns over having to become experts in the fine details of SFIP and private flood insurance policies and the differences between them. However, the proposed compliance aid does little to alleviate these concerns due to the presence of the second criterion listed above, which places the burden right back on the lender to verify that the private policy provisions satisfy the criteria included the definition.

If the Agencies were to delete the second criterion, the proposed compliance aid would be very helpful indeed. It would be the very safe harbor that lenders need to be able to maintain regulatory compliance on a cost-effective basis. Insurers are, after all, far better equipped to evaluate their policy forms against the applicable regulations and develop simple certifications to accompany them. Insurers also are able to spread the one-time costs of doing those comparisons over hundreds if not thousands of policies issued on the same form whereas lenders can easily find themselves in the position of reviewing hundreds if not thousands of unique policy forms every year.

However, even if the Agencies were to delete the second criterion, the Association remains concerned about whether private insurers will find it worth their while to summarize and certify their private flood insurance policy forms, having no legal obligation to do so. If private insurers choose not to offer the summary and certification service, lenders will be back where they started. We can hope that individual insurers will provide summaries and certifications in order to obtain a competitive advantage over the insurers that do not summarize and certify, but the insurers that do not summarize and certify will continue to have leverage over lenders fearful of being sanctioned for failure to accept a compliant policy.

Accordingly, the Association would prefer to see a correlative safe harbor that protects lenders who choose not to accept private flood insurance policies that are not insurer self-certified.

III. Discretionary Acceptance of Private Flood Insurance

The 2016 Proposed Rule would allow discretionary acceptance of flood insurance policies issued by private insurers that do not meet the mandatory acceptance criteria as long as they meet a series of *other* criteria, one of which remains that the policy must either be "at least as broad" as the coverage under an SFIP or provide coverage that is "similar" to coverage provided under an SFIP, including when considering deductibles, exclusions, and conditions offered by the insurer. In determining whether the coverage is "similar" to coverage provided under an SFIP, the proposal would require the lender to: (1) compare the private policy with an SFIP to determine the differences between the private policy and an SFIP; (2) reasonably determine that the private policy provides sufficient protection of the loan secured by the property located in an SFHA; and (3) document its findings.

Taken as a whole, the regulatory scheme outlined in the 2016 Proposed Rule would require lenders to conduct up to two reviews of each private flood insurance policy that is tendered for approval: The first, a review to determine whether the policy meets the mandatory acceptance criteria, and then, a second, if the policy did not meet the mandatory acceptance criteria, a review to determine if the policy meets the alternative discretionary acceptance criteria. As the business of comparing private flood insurance policies on a case-by-case basis to determine whether it MUST be accepted is time-consuming and costly enough, chances are associations will be weary and disinclined after the first review to undertake the second review. Instead, a likely approach will be to adopt a policy of rejecting all private insurance

policies that can be lawfully rejected based on the simple fact that it is safer and less costly to reject a policy that need not be accepted than to risk accepting a policy that might later be determined to be non-compliant.

On the other hand, if private insurers were to be given the authority, and even the direction, to self-certify their policies as meeting the discretionary criteria, and if lenders were permitted to rely on such self-certifications, associations would be far more likely to accept those policies, thus improving borrowers' access to a broader flood insurance market.

V. Conclusion

American AgCredit appreciates the opportunity to comment on the proposed amendments to the regulations regarding the acceptance of private flood insurance for loans in areas having special flood hazards, and urges the Agencies to strongly consider the comments made above. Please contact me if you have any questions or wish to discuss any of these matters in more detail.

Sincerely,

Byron Enix, CEO