FDIC
Federal Deposit Insurance Corporation
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# MEMORANDUM

To: Public Comment File – RIN3064 – AE03 (FDIC)
(Loans in Areas Having Special Flood Hazards; Proposed Rule)

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Date: December 10, 2013

Subject: **Telephone call with Craig Poulton, Poulton Associates, Inc.**

On December 3, 2013, Craig Poulton initiated a telephone call with the Office of the Comptroller of Currency, Federal Reserve Board, National Credit Union Association, Farm Administration and the Federal Deposit Insurance Corporation to discuss the Notice of Proposed Rulemaking (NPR) concerning Loans in Areas Having Special Flood Hazards. At Mr. Poulton's invitation, Mike Pieper (Pieper GPA) and Paul Howard (Arnold and Porter, representing Lloyd's of London) also participated in the call. The discussion focused on the private insurance provisions included in the proposed rule.

**Issues and Concerns Expressed by Mr. Poulton**

Mr. Poulton opined that insurance is an arcane area and that the proposed definition of private flood insurance and the proposed safe harbor provision both pose problems for private flood insurance (PFI) providers. Mr. Poulton noted that a PFI provider's policies may not meet the proposed definition of PFI in some States, due to that State's insurance laws. Mr. Poulton also noted that due to the safe harbor provision, insurance providers would not be able to sell PFI until the State insurance regulator has approved the insurance policy as compliant with the definition of PFI.

Mr. Poulton stated that regulators penalize lenders that accept insurance that does not meet the PFI definition. Mr. Poulton commented that Federal bank examiners currently determine whether policies are in compliance with applicable regulations and the proposed safe harbor would replace this determination with that of the state insurance regulators who, while more knowledgeable in this area, may still offer differing opinions that lead to confusion. According to Mr. Poulton, the end result is a moving target as to which PFI policies will be in compliance and requires PFI providers that offer PFI in more than one state to work with possibly 50 different state insurance regulators and definitions in order to conduct business in each state.

Mr. Poulton raised some concerns about the definition of PFI as provided in the Biggert-Waters Flood Reform Act of 2012 (the “Act”) and NPR. He stated that the PFI definition would cause confusion due to difficulty in determining the meaning of “at least as broad as the coverage provided under a standard flood insurance policy under the NFIP [National Flood Insurance Program] …”. According to Mr. Poulton, there is additional confusion over which version of the NFIP would be used for the comparison. Mr. Poulton commented that PFI providers have had their policies rejected due to insuring against more possible perils rather than just on flood issues. Mr. Poulton stated that PFI providers are finding it difficult to meet the PFI definition and state requirements. Other complications brought up by Mr. Poulton include the requirement for providers to give a 45 days written notice of cancellation or non-renewal of flood insurance coverage. Mr. Poulton asserted that the 45-day requirement conflicts with the requirement for a PFI to “contain cancellation provisions that are as restrictive as the provisions contained in a standard flood insurance policy under the NFIP”. He stated that NFIP policies do not contain any cancellation provision. Lastly, Mr. Poulton noted that the definition of “flood” included in some PFI policies can be different from that of the NFIP which has led to these PFI policies being rejected by lenders and regulators as not meeting the definition of PFI.

Mr. Poulton advocated that the federal regulators allow PFI policies that do not meet the PFI definition in the Act or the NPRM to satisfy the mandatory purchase of flood insurance requirement.

The crucial issue according to Mr. Poulton is whether an insurance policy that does not comply with the PFI definition in the Act and NPRM can still be acceptable, and in his opinion, the answer is yes. Mr. Poulton asserted that if Congress had a different intention, it would not have drafted the definition as provided in the Act, there would have been changes to the McCarran–Ferguson Act, Congress would have appropriated funds for the new regulatory mechanism, and the definition would have been more objective rather than subjective.

Mr. Poulton suggested that the criteria for allowing the purchase of PFI from a provider that does not meet the definition should be the following:

- Provide insurance for the statutorily required amount and term;
- Ability to pay insurance claims of the PFI provider;
    - Determined to be solvent as required by the GSEs[1] and regulators; and
    - Subject to the State Insurance Commissioner (NFIP is exempt).

In Mr. Poulton’s opinion, the federal regulators must make allowances for non-compliant policies that do not meet the definition for PFI. He suggested that the following provisions should govern PFI because they are reasonable, prudent, and satisfy Congressional intent:

[1] For example, GSEs determine acceptable financial rating, such as a B+ by a national rating company – *e.g.*, Standards and Poor’s.

- Insurance agents are responsible for comparing all available coverage;
- State Insurance Commissioners approve the sale of the policies in their jurisdiction;
- Lenders are free to accept or reject policies that do not meet the definition; and
- Guidelines should be similar to other insurance options (auto, home owners, etc.)

According to Mr. Poulton, the changes would lead to a productive market for PFI.

Mr. Poulton mentioned that he would submit a formal comment letter on the NPRM that would detail other issues and might include concerns and issues discussed at today's meeting.