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January 6, 2017

***By electronic delivery to:***

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**Re: Loans in Areas Having Special Flood Hazards – Private Flood Insurance; OCC - Docket ID OCC-2016-0005; Board RIN 7100 AE 60; NCUA RIN 3133-AE64.**

Ladies and Gentlemen:

JPMorgan Chase Bank, N.A. ("JPMC") is pleased to have the opportunity to comment on the proposed regulations (the "Proposal") that would implement the "private flood insurance" provisions of the Biggert-Waters Flood Insurance Reform Act of 2012 ("BWA"), as issued for public comment by the Office of the Comptroller of the Currency, the Farm Credit Administration, the Board of Governors of the Federal Reserve System, the National Credit Union Administration and the Federal Deposit Insurance Corporation (collectively, the "Agencies").

JPMC appreciates the thoughtful and thorough job the Agencies did in developing the Proposal. Below, we will respond to the Agencies' solicitations for comment. We also highlight areas of the Proposal where we believe the Agencies should consider modifications or clarifications, as well as areas that would present significant operational challenges.

**Private Flood Insurance**

**Mandatory Acceptance**

The Proposal includes a new provision that would require a regulated lending institution to accept a private flood insurance policy that meets both: (1) the statutory definition of "private flood insurance[1]," and (2) the mandatory purchase requirement. The proposed definition of "private flood insurance" contains all the criteria imposed by Section 100239 of BWA, which added a new Section 102(b)(7) to the Flood Disaster Protection Act ("FDPA"). We recognize that the Agencies are bound by the language of the statute, but nonetheless want to point out the

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[1] Under the Proposal, "*Private flood insurance* means an insurance policy that:
(1) Is issued by an insurance company that is:
(i) Licensed, admitted, or otherwise approved to engage in the business of insurance in the State or jurisdiction in which the property to be insured is located, by the insurance regulator of that State or jurisdiction; or
(ii) Recognized, or not disapproved, as a surplus lines insurer by the insurance regulator of the State or jurisdiction in which the property to be insured is located in the case of a policy of difference in conditions, multiple peril, all risk, or other blanket coverage insuring nonresidential commercial property;
(2) Provides flood insurance coverage that is at least as broad as the coverage provided under an SFIP, including when considering deductibles, exclusions, and conditions offered by the insurer. For purposes of this part, a policy is at least as broad as the coverage provided under an SFIP if, at a minimum, the policy:
(i) Defines the term ''flood'' to include the events defined as a ''flood'' in an SFIP;
(ii) Covers both the mortgagor(s) and the mortgagee(s) as loss payees;
(iii) Contains the coverage and 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;
(iv) Contains deductibles no higher than the specified maximum for the same type of property, and includes similar non-applicability provisions, as under an SFIP, for any total policy coverage amount up to the maximum available under the NFIP at the time the policy is provided to the lender;
(v) Provides 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 pertain only to coverage that is in addition to the amount and type of
coverage that could be provided by an SFIP; and
(vi) May not contain conditions that narrow the coverage provided in an SFIP;
(3) Includes all of the following:
(i) A requirement for the insurer to give written notice 45 days before cancellation or non-renewal of flood insurance coverage to:
(A) The insured; and
(B) The national bank or Federal savings association that made the designated loan secured by the property covered by the flood insurance, or the servicer acting on its behalf;
(ii) Information about the availability of flood insurance coverage under the NFIP;
(iii) A mortgage interest clause similar to the clause contained in an SFIP; and
(iv) A provision requiring an insured to file suit not later than one year after the date of a written denial of all or part of a claim under the policy; and
(4) Contains cancellation provisions that are as restrictive as the provisions contained in an SFIP."

shortcomings of this definition. As the Agencies are aware, these shortcomings have been widely recognized by the banking industry, bank and insurance trade associations, and the House of Representatives which unanimously approved corrective legislation. We believe that strict adherence to these criteria or reliance upon them as a supervisory guideline will result in the acceptance of very few private policies, thus frustrating BWA's intention of encouraging the private flood insurance market. Because private policies typically vary from the standard flood insurance policy ("SFIP") criteria that BWA imposes, we rarely receive a private policy that would meet the BWA definition in all respects. Some of the specific challenges posed by the elements of the BWA definition are discussed below:

**Complete Policies Not Available.** One of the major challenges with private flood insurance, particularly commercial policies, is that lenders often do not receive the entire policy for review. In some cases, the policy is not available from the insurer at the time of a transaction or borrowers refuse to provide the lender with a full copy of the insurance policy due to confidentiality concerns when the policy covers properties that will not be mortgaged to the lender. Additionally, when a lender receives a private policy that will be used to cancel a lender placed flood insurance policy, BWA and the Agencies explicitly limit the information the lender can require. Determining, for example, whether the policy is "at least as broad as" an SFIP based on a declarations page alone is not feasible.

**Inflexible and Unweighted Criteria Cause Unnecessary Lender Placement.** Although the BWA criteria vary in significance, they are not risk-weighted. As a result, failure to meet any of the criteria may result in rejection of a private policy and lender placement, regardless of whether there are other factors present that may protect the lender and the customer's interests. For example, if the policy otherwise meets the BWA criteria but provides for 30 days' notice instead of 45 days, lenders may feel it necessary to lender place insurance regardless of the fact that there is evidence of flood insurance coverage on the property. The result will be that the borrower is paying double premiums, but will only receive coverage from one policy.

**45 Days' Notice of Policy Cancellation or Non-Renewal.** State law dictates the number of days' notice required for cancellation of different types of insurance, usually between 10 – 90 days. 45 days' notice is sometimes required, but is certainly not the industry standard.

**Deductibles.** Particularly on commercial policies, deductibles on private policies can far exceed those offered by the NFIP, as do the coverage amounts. Applying the strict BWA criteria does not allow the lender to consider whether the borrower has the financial capacity to meet the deductible. While there should be a reasonable proportionality between coverage amounts and deductibles, the deductible options offered under an SFIP are generally capped at lower amounts due to the lower available NFIP coverage amounts.

**Blanket Policies.** While an NFIP policy ordinarily covers just one structure (and its contents, if applicable), a commercial blanket policy often covers multiple structures (and contents, if applicable), at multiple locations. A blanket policy is designed to take into account geographical dispersion of risk associated with multiple insured properties and provides a loss limit for all structures (and contents, if applicable) damaged in each flood. Similarly, while the deductible on a blanket policy can exceed the value of any single insured structure, it is applied on a per loss basis rather than a per structure basis. The amount of coverage under a blanket policy may appear to compare unfavorably to an SFIP policy on a per structure basis if the expectation is for each structure to have the maximum amount available through the NFIP. The risk under a blanket policy is spread among the insured properties and the amount of coverage is calculated not on a per structure basis, but rather takes into account the improbability that all structures across all geographic locations will be damaged in one flood. These policies often provide superior coverage on an aggregate basis as they are designed to cover the flood risk of multiple properties (often whether or not in an SFHA) under one policy. Holding these policies to an SFIP standard may actually expose commercial customers to greater risk and will certainly increase costs if lenders insist on the purchase of an additional SFIP(s) on top of their private coverage simply to meet the BWA requirements.

**Cancellation Provisions as Restrictive as SFIP.** Many states have very specific cancellation and non-renewal provisions that may be different from those contained in an SFIP.

**Requirement to Bring Suit within 1 Year after Date of Written Denial of a Claim.** These provisions vary in private policies and sometimes there is no requirement on when suit must be brought.

**Information about the Availability of Flood Insurance Coverage under the NFIP.** Since these policies are issued by private insurance companies, they do not include NFIP information as it has no relevance there, nor is it necessary as the customer already received such information with the Notice of Special Flood Hazards.

We also note that the criterion in Part 22.2(k)(1) requiring licensure or admittance of an insurance company does not allow for consideration of the financial strength or rating from a recognized insurance carrier rating organization. Lenders could, therefore, be required to accept private flood insurance policies meeting all of the criteria from an insurance company that may not meet minimum financial strength/rating tests set by lenders or investors.

- *[The] Agencies specifically request comment on whether these criteria facilitate a regulated lending institution's determination of whether flood insurance coverage is "at least as broad as" the coverage provided under the SFIP.*

We welcome the Agencies' efforts to establish objective criteria to determine whether flood insurance coverage is "at least as broad as" the coverage provided under the SFIP. This is a significant improvement over the BWA language, which treats the "as least as broad as" criteria as a separate test from the enumerated policy requirements. However, the proposed criteria in subsections (iii) - (vi) of proposed Part 22.2(k)(2) require interpretations that are inherently subjective and will not be feasible for lenders without insurance professionals on staff. Lack of objective standards will continue to result in differences in opinions between institutions (particularly on syndicated transactions) and between bank employees, exam teams, and lenders who are trying to comply.

**SFIP Version**

- *The agencies specifically request comment on whether this is the correct time-frame for determining what version of the SFIP the regulated lending institution should use to evaluate the private policy.*

The proposed rule would define "SFIP" to mean a standard flood insurance policy issued under the NFIP in effect as of the date the private policy is provided to a regulated lending institution. We agree with that definition, but request that lenders be given a reasonable period of time to update systems and change processes to accommodate material changes to the SFIP forms.

**Proposed "Compliance Aid"**

- *[The] Agencies request comment on all aspects of this proposed compliance aid provision. In particular, commenters should address whether the provision as proposed would assist regulated lending institutions in complying with the requirement to accept insurance policies that meet the definition of "private flood insurance." Furthermore, commenters should address whether each of the three criteria in this proposed provision is necessary and feasible. Moreover, the Agencies request comment on whether this provision may provide an incentive to insurance providers to demonstrate that their policy meets the definition of "private flood insurance" and, therefore, must be accepted by regulated lending institutions.*

We strongly supported the Agencies' proposal to establish a safe harbor for complying with the requirement to accept insurance policies that meet the definition of "private flood insurance." In particular, we supported the alternative safe harbor proposed by the American Bankers Association, the American Bankers Insurance Association, and the Consumer Bankers Association in their public comment letter dated December 6, 2013, which provided an option for insurers to certify that their policies comply with the criteria set forth in BWA. The proposed Compliance Aid includes an insurer certification, but requires the lender to perform due diligence to check the insurance company's conclusions that the policy meets the definition of private flood insurance under the regulation. Given the additional requirements of an insurer summary and the lender's obligation to verify the same, the certification (and, by extension, the proposed Compliance Aid) do not ease the burdens on lenders as envisioned in the 2013 comment letter.

In addition, as the Agencies have stated in the Proposal, the Compliance Aid is not a "safe harbor" in that it does not relieve a lender from liability if it fails to accept a policy that meets the definition of private flood insurance. Given that lenders must duplicate the work performed by the insurer and can still be second-guessed in making the determination of whether a policy meets the proposed definition, regardless of the assurances of the insurance company, we do not think that the Compliance Aid will assist lenders in making this determination. We believe that only the first and third Compliance Aid criteria are necessary and that a lender should be able to rely on the analysis of the insurance company as the basis for accepting an insurance policy as meeting the definition of private flood insurance. We further believe that requiring an insurer summary and a certification of compliance with respect thereto, if obtained, would afford adequate recourse for lenders and policyholders in the unlikely event of an insurer breach thereof. An insurance company professional will, by definition, have greater expertise regarding their products and a more thorough knowledge of policy terms and conditions, and the impact of state law so as to apply the Mandatory Acceptance criteria.

**<u>Discretionary Acceptance</u>**

- *[The] Agencies solicit comment as to whether these proposed criteria are appropriate for regulated lending institutions accepting flood insurance policies issued by a private insurer that do not meet the statutory definition of "private flood insurance." In particular, the Agencies seek comment on whether the proposed criteria are compatible with industry practice, or whether the proposed criteria would exclude currently accepted policies or significantly limit the growth of the market for flood insurance policies issued by private insurers.*

We share the Agencies' belief that the Congressional intent of BWA was to stimulate the private flood insurance market and BWA should, therefore, be construed as intentionally permitting the discretionary acceptance of private policies that do not meet all aspects of the statutory definition. In practice, however, the industry will face significant challenges in applying some of the proposed criteria to a diverse mix of private flood insurance policies. In the absence of final regulations, lenders have referred to the BWA criteria for general guidance in reviewing private policies, but have primarily utilized business judgment to determine the adequacy of private policies, and for good reason. The SFIP forms issued under the NFIP are mandated by FEMA and provide a uniformity that does not exist for private policies. This makes comparisons difficult and, in some cases irrelevant. For example, in the case of large syndicated transactions where multi-million dollar policies covering properties around the world are involved, it is not really possible (or relevant) to compare these policies to an SFIP that covers a single structure. In some instances, a private policy provides coverage that an SFIP does not (for example, business interruption coverage) while an SFIP may cover other items that the private policy does not.

Some of the proposed criteria for discretionary acceptance (discussed below) are objective and reasonable standards to apply, and we thank the Agencies for developing these criteria. However, as a group, the proposed criteria do not provide adequate flexibility to lenders in evaluating these policies. We believe that applying these criteria will result in the rejection of many private policies that are widely accepted by lenders today and will have a particularly adverse effect on commercial real estate lending. A private policy is better assessed by focusing on overall value, including the properties covered, the locations of the properties, collateral loan balance, creditworthiness of the client, market capacity in the insurance industry and the price of the insurance, rather than through direct comparison to an SFIP. We urge the Agencies to permit continuing flexibility in private policy reviews as the best approach for facilitating sound lending practices while maintaining and expanding the private flood insurance market.

We also are concerned that creating a federal definition of private flood insurance in the context of defining discretionary acceptance criteria has a real risk of creating a collision course with private policies approved under state law by state regulators. At stake is the risk of *reducing* the number of private policies being accepted today, *increasing* the federal burden of funding the NFIP, *frustrating the goals* of BWA, and *reducing customer choices*. Thus, we recommend discretionary acceptance criteria that balance these significant risks with safe and sound banking practices.

With these concerns in mind, we agree with portions of the Proposal but recommend important changes in some areas. We support the general thrust of proposed Part 22.3(c)(3)(i) as it relates to licensing, however, we think the Proposal goes too far in incorporating all of the BWA criterion as it relates to surplus lines policies. We would, therefore, recommend deletion of the phrase "insuring nonresidential commercial property". Today, residential lenders routinely accept private policies insured with surplus lines carriers if the coverage is acceptable and the policies are placed with highly rated and/or respected non-admitted insurers. Surplus lines policies are also frequently purchased by condominium and PUD homeowner associations. Under proposed subsection (c)(3)(i), it is arguable that the use of the words "surplus lines" in connection with "nonresidential commercial property" will be interpreted as precluding the acceptance of valuable private policies that are accepted today. Such a limitation would immediately disadvantage all federally regulated lenders currently accepting these policies, put national banks and their customers at a distinct disadvantage, and impede the stated goals of BWA. In addition, as noted elsewhere in this letter, private policies often have provisions that are superior to SFIPs and the final discretionary criteria should not be so restrictive that those superior features have to be ignored solely because a surplus lines policy is utilized.

We believe that Part 22.3(c)(3)(ii) (requirement to cover both mortgagor and mortgagee as loss payees) is reasonable and helpful to all concerned and support retaining this criterion. However, we would request that master policies, such as condominium and PUD homeowner association policies, be excluded from this requirement, as lenders secured by individual units are not listed as loss payees on such policies.

We would suggest that the word "mandated" in Part 22.3(c)(3)(iii) (reasons for cancellation) be changed to "permitted." State laws generally provide for the circumstances under which cancellation of a policy is permitted but they may not require that a policy be cancelled if such circumstances occur.

We appreciate the Agencies' efforts to provide some flexibility to lenders by including the two alternative prongs of Part 22.3(c)(3)(iv), however, both prongs would require subjective interpretations by lenders that do not have the necessary insurance expertise to make such determinations. The first prong, subsection (c)(3)(iv)(A), requires strict compliance with five of the six "at least as broad as" criteria proposed in Part 22.2(k)(2). Based upon our experience, there will be an unacceptably high fail rate under the first prong if the Agencies require these five criteria. For example, in the case of subsection (k)(2)(iii), private policies often have coverage and provisions that are not coextensive with those in an SFIP; however, some of those same private policies have superior coverage and provisions in other respects. These policies would fail under the first prong although, on balance, they provide equal or better protection. In our view, the first prong is overly prescriptive, does not allow enough discretion, and will frustrate the purposes of BWA and the Agencies' worthy objective of allowing for discretionary policy approvals.

The second prong, subsection (c)(3)(iv)(B), is much closer to a workable standard. We believe that, given the rigidity of the first prong, the second prong ultimately supplants the first as a balanced, flexible basis for discretionary approvals. Consequently, we recommend the following changes to subsection (c)(3)(iv)(B). First, we believe the word "similar" should be replaced by the word "comparable". The "similar" standard is likely to invite a rigid, feature-by-feature scorecard approach rather than the flexible balancing of policy features that the industry needs and follows today. A "comparable" standard would require coverage and features to be compared, analyzed and documented, but recognizes the likelihood that there will be differences as well as similarities. Second, the goal here should not be to match the SFIP, but to assure that the basic requirements of flood insurance coverage for the particular type of property are satisfied. To that end, we recommend deletion of the phrase "including when" in favor of identifying exactly which provisions should be reviewed in the comparison. We believe that the three provisions referenced in the Proposal (i.e. deductibles, exclusions and conditions), together with the type of property and exposure covered, are the critical factors to be considered in this regard. Third, we note that the Agencies' proposed exception for mutual aid societies contains requirements that more closely reflect the manner in which lenders actually evaluate private policies today and recommend that requirements similar to those set forth in Part 22.3(c)(4)(iv)(A) – (C) be adopted in subsection (c)(3)(iv)(B) for determining whether a private policy sufficiently protects the loan. We, therefore, propose the following changes to subsection (c)(3)(iv)(B):

> "(B) Provides coverage that is *comparable* ~~similar~~ to coverage provided under an SFIP, ~~including when~~ considering *the type of property and exposure covered and the* deductibles, exclusions and conditions offered by the insurer, and the national bank or Federal savings association has:
>
> (1) Compared *the above provisions of* the private policy with *the comparable provisions of* an SFIP to determine the differences between the private policy and an SFIP;
>
> (2) Reasonably determined that the private policy provides sufficient protection of the loan secured by the property located in a special flood hazard area. *In making this determination, the national bank or Federal savings association must:*
>
> a. *Verify that the private policy is consistent with general safety and soundness principles, such as whether deductibles are reasonable based on the borrower's financial condition; and*
>
> b. *Consider the insurance company's ability to satisfy claims based on the ratings of a recognized insurance company rating organization;* and
>
> (3) Documented its findings under paragraphs (c)(3)(iv)(B)(1) and (2) of this section." (emphasis added)

We believe that permitting lenders to accept private flood insurance policies that do not meet the BWA definition, but meet the above criteria, would simultaneously encourage the development of the private flood insurance market and satisfy the Agencies' concerns with respect to the protection of both lenders and customers.

- *Separately, the Agencies request comment in three other areas related to the proposed discretionary acceptance criteria:*

  1. *Whether the phrase "sufficient protection of the loan" is adequately clear.*

     We do not believe that this phrase is adequately clear. Without guidance about how the Agencies interpret this phrase, lenders will have difficulty adequately documenting their decisions. Differences in opinions between lenders are likely to occur and, possibly, differences between the Agencies and their exam teams. As proposed above, a definition of this phrase similar to the one proposed under the mutual aid society exception would be appropriate. While, in our opinion, "safety and soundness" inherently includes creditworthiness and collateral value in addition to the borrower having an SFIP or private policy, we recommend that the regulation explicitly so state.

  2. *Whether the proposed criteria raise any safety and soundness risks for regulated lending institutions.*

     We do not think that private flood insurance raises safety and soundness risks different from any other type of property insurance evaluated by regulated lenders to protect their collateral. We believe that the criteria in the Proposal with our suggested changes adequately address these risks.

  3. *Whether the proposed criteria raise any consumer protection issues.*

     The private policy review criteria, both as proposed and as revised by our suggested modifications, do not raise consumer protection issues. The current state insurance regulatory system is charged with protecting consumers across all insurance products, not just private flood insurance policies. The proposed criteria will add valuable federal consumer protections for private flood insurance that do not apply to other insurance products and, therefore, buttress the oversight conducted at the state level.

**<u>Discretionary Acceptance for Non-Residential Property</u>**

- *The Agencies request comment on whether the proposed definition of "private flood insurance" or the proposed discretionary acceptance provision, both of which include specific requirements with respect to deductibles, exclusions, conditions and cancellation, would prevent regulated lending institutions from accepting flood insurance policies issued by private insurers in the nonresidential lending context, even though coverage not including these requirements would be acceptable for policies covering another type of risk, such as fire or wind. Furthermore, the Agencies request comment on whether the final rule should include criteria for the discretionary acceptance of flood insurance policies issued by private insurers for nonresidential properties that are different from the criteria applicable to flood insurance policies issued by private insurers for residential properties.*

We believe the proposed definition and discretionary acceptance provisions would hinder lenders' ability to accept private flood insurance policies in both residential and non-residential lending contexts for all the reasons previously stated. However, the provisions would likely have a larger negative impact on non-residential private flood insurance policies. In our experience, the coverage provisions of non-residential private flood insurance policies can be very complex and vary significantly from an SFIP, making it difficult for lenders to use standards tied to an SFIP to determine acceptability. Many non-residential private flood insurance policies are surplus lines insurance policies. Surplus lines insurance tailors coverage and price to fit the risk; therefore, its coverage and forms do not mirror those of the SFIP. Other non-residential private flood insurance policies are admitted products, but because they are designed by their carriers to compete with NFIP coverage by offering greater limits, broader coverage, or more coverage features, their coverage and forms also differ from an SFIP. Further examples of the differences between these types of policies are listed below:

- Non-residential private flood insurance policies may cover multiple risks, including flood. An SFIP is a named perils policy.
- Non-residential private flood insurance policies do not typically cover just one building; they usually have schedules of locations subject to coverage. SFIPs cover only one building.
- Non-residential private flood insurance policies have a variety of coverage features and exclusions. It is common for a non-residential private flood insurance policy to have a much higher stated coverage amount than an SFIP.
- Non-residential private flood insurance policies have deductibles proportional to their coverage.

Residential private flood insurance policies, while much less complicated, also present different pros and cons versus an SFIP. We believe that if our recommendations under "Discretionary Acceptance" above are adopted, then lenders will have the needed flexibility to accept private flood insurance policies meeting those criteria in both the residential and non-residential lending contexts. If the Agencies are not inclined to modify the discretionary provisions for all types of lending, we would recommend that the criteria suggested above for discretionary acceptance of private flood insurance be adopted for non-residential private flood insurance policies and that multi-family buildings be included in the definition of "nonresidential properties."

**<u>Mutual Aid Societies</u>**

- *[The] Agencies request specific comment on whether the terms of this proposed definition adequately cover the types of organizations that should be considered "mutual aid societies" for purposes of the discretionary acceptance provision in this proposed rule. Specifically, the Agencies request comment on whether the proposed criteria are too broad or too narrow, and, if so, whether the final rule should include alternative, or additional, criteria.*

We appreciate the Agencies' innovative thinking behind this exception and willingness to explore non-traditional insurance coverage to satisfy the mandatory purchase requirement. As the Agencies have recognized, a mutual aid society pools the risks of similarly situated members who pay for the losses of the whole as they occur. There are other non-traditional insurance vehicles that function in a similar manner, particularly in the commercial market. We encourage the Agencies to consider expanding the exception to apply to, for example, captive insurance companies that employ risk shifting and distribution mechanisms or have otherwise mitigated risks by partnering with unrelated insurance companies.

- *[The] Agencies request comment on the proposed requirements for discretionary acceptance of policies issued by mutual aid societies, including the proposed criteria a regulated lending institution would be required to consider in determining whether the policy provides sufficient protection for the loan.*

Although we do not see many of these types of policies, we generally support the Agencies' attempts to provide additional flexibility but would, however, note that that it would be very challenging for lenders to determine and document the requirement in Part 22.3(c)(4)(iv)(B).

**Implementation Period**

Given the numerous challenges presented by the Proposal as identified above, lenders will face significant operational and other hurdles in implementing the regulations once issued. We would, therefore, recommend that the implementation period be at least one year from the date that regulations are adopted and the application of such regulations should be only on a prospective basis.

JPMC appreciates this opportunity to provide comments on the Proposal. If you have any questions, please contact Kathleen Dufraine, Executive Director, Corporate Flood Program, at 214-965-4531.

[Signatures on following page]

Sincerely yours,

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