



Agencies Issue Another Proposal on Private Flood Insurance

The Biggert-Waters Act requires the federal banking agencies to issue regulations that direct regulated lending institutions to accept private flood insurance if certain requirements are met. 42 USC 4012a(b)(1)(B). Despite what insurance agents may be telling your borrowers, this requirement is not effective until the federal banking agencies issue implementing rules. (Refer to the *Interagency Statement on the Impact of Biggert-Waters Act* (Mar. 29, 2013), FDIC FIL-14-2013, FRB CA 13-2, NCUA Letter No. 13-RA-03, and OCC Bulletin 2013-10.) In other words, at this time, a lender may, but is not required, to accept private flood insurance policies (so long as the policy conforms with FEMA's Six Criteria discussed in the previous article).

In October 2013, the agencies issued a proposed rule to implement, among other things, the Biggert-Waters Act's mandatory acceptance of private flood insurance provisions (2013 Proposal). 78 FR 65108. In October 2016, instead of issuing a final rule to implement the private flood insurance provisions, the agencies issued another proposed rule on the issue (2016 Proposal). 81 FR 78063.

Once implemented, lenders will have to accept private flood insurance policies that meet the eight criteria set forth in the Biggert-Waters Act. Some of the Biggert-Waters Act criteria are very similar to FEMA's Six Criteria. The Biggert-Waters Act's criteria are the following (as proposed to be implemented by the 2016 Proposal):

Criterion #1: The private flood insurance policy must be issued by an insurance company that is licensed, admitted or otherwise approved to engage in the business of insurance in the state or jurisdiction in which the insurance building is located, by the insurance regulator of that state or jurisdiction;

Criterion #2: In the case of a policy of difference in conditions, multiple peril, all risk or other blanket coverage insuring nonresidential commercial property, the insurance company 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;

Criterion #3: The policy must provide flood insurance coverage which is at least as broad as the coverage provided under a Standard Flood Insurance Policy (SFIP) under the NFIP, including when considering deductibles, exclusions and conditions offered by the insurer;

Criterion #4: The policy must include a requirement for the insurer to give 45 days' written notice of cancellation or non-renewal of flood insurance coverage to the insured and the lender;

Criterion #5: The policy must include information about the availability of flood insurance coverage under the NFIP;

Criterion #6: The policy must include a mortgage interest clause similar to the clause contained in an SFIP under the NFIP;

Criterion #7: The policy must include 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

Criterion #8: The policy must contain cancellation provisions that are as restrictive as the provisions contained in an SFIP under the NFIP.

In the 2016 Proposal, the agencies are adopting substantially similar criteria. The agencies are also proposing some additional provisions that were not provided for in the Biggert-Waters Act, some of which are summarized below.

Safe harbor eliminated. In the 2013 Proposal, the agencies requested comment on the inclusion of a safe harbor. This proposed safe harbor would allow lenders to rely on the expertise of state insurance regulators to determine whether a policy meets the Biggert-Waters Act's criteria such that a lender must accept it. The agencies proposed to include this safe harbor because of concern that many regulated lending institutions, especially small institutions, would have difficulty evaluating whether a private flood insurance policy must be accepted, given their lack of technical insurance expertise regarding flood insurance policies.

The agencies received many negative comments on the safe harbor. For example, commenters noted that:

- There is currently no mechanism or process for a state insurance regulator to make such a determination;
- State insurance regulators do not directly supervise surplus line insurers and, therefore, the safe harbor would not be available for surplus line insurers; and
- State insurance regulators lack the legal authority to certify that a private flood insurance policy complies with federal law.

For all of these reasons, the agencies have abandoned the 2013 Proposal's safe harbor and instead are proposing a "compliance aid provision" in the 2016 Proposal. As now proposed, the compliance aid provision will provide that a policy is deemed to meet the Biggert-Waters Act's criteria if the following three criteria are met:

Criterion #1: The policy includes, or is accompanied by, a written summary that demonstrates how the policy meets the eight private flood insurance criteria by identifying the provisions of the policy that meet each criterion, and confirms that the insurer is regulated in accordance with those criteria;

Criterion #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 eight criteria; and

Criterion #3: The policy includes the following provision within the policy or as an endorsement: "This policy meets the definition of private flood insurance contained in 42 USC 4012a(b)(7) and the corresponding regulation." The agencies refer to this as the "assurance clause," as it could provide the policy holder and lender with recourse against the insurance company if the company fails to abide by the terms included in the definition of "private flood insurance."

Non-compliant private flood policies. Although the Biggert-Waters Act was silent on this, the agencies are proposing adding a rule that will allow lenders to accept private flood insurance policies that do not meet the Biggert-Waters Act's eight criteria, but meet other somewhat similar criteria.

The BCG Monthly Telephone Briefing on November 18, 2016 will go through the 2016 Proposal in more detail. Also, we will discuss private flood insurance as well as the other hot flood insurance issues during the BCG Webinar, *Flood Insurance Regulations Update*, on November 15, 2016. Refer to www.bankerscompliancegroup.com/pdf/webinar-announcements/WEBNovember16.pdf for more information regarding this webinar.