

Private Flood Insurance: Regulatory Proposal Requiring Mortgage Lenders to Accept "Private Flood Insurance" Policies Still Remains to be Finalized by Agencies

With the spring home buying season fast approaching and an increase in residential mortgage lending by banks and mortgage companies, we have been fielding a number of questions from lenders about the status of private flood insurance regulatory proposals. This e Alert summarizes the status of the banking agencies' regulatory proposals requiring lenders to accept private flood insurance policies as alternatives to standard flood insurance policies issued under the National Flood Insurance Program ("NFIP"). The brief answer is that no final private flood insurance rules have been adopted yet and, regardless what insurance agents or borrowers might tell you, lenders are not required to accept private flood insurance policies at this time.

Background

In 2012, Congress passed legislation (the "Biggert-Waters Flood Insurance Reform Act") that sought to make the flood insurance market more robust and competitive, and directed the banking and credit union regulators (FRB, FDIC, OCC, NCUA, Farm Credit) to issue a joint interagency rule requiring lenders to accept private flood insurance policies, rather than only accepting policies issued under the NFIP.

Since then, the agencies have issued two proposed rules for private flood insurance—first in 2013 and then again in November 2016. (The 2013 proposed rules were withdrawn before being adopted.) The 60 day Comment Period on the latest rule proposal ended in January, and no final private flood rules have yet been adopted. The rules requiring lenders to accept private flood insurance policies have been controversial since they were first proposed in 2013, and continue to be so. Given the present uncertainty in Washington over the timing of the adoption of any new federal regulations, it is unwise to speculate when these agencies might actually approve the latest proposed flood rule.

We have heard that some insurance agents are incorrectly advising lenders and

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borrowers that the final private flood insurance rules have been issued and are effective, and that lenders are required to accept conforming private flood insurance policies. Until the proposed interagency rules have been made final, this is not the case at this time. It is anticipated that the cost of purchasing private flood insurance policies may be substantially less than the cost of purchasing a standard flood insurance policy issued under the NFIP, so borrowers with this closing requirement no doubt will be anxious to save costs.

Discussion

When the new rules are finalized and become effective, regulated lenders will be required to accept private flood insurance policies that conform with criteria included in the Biggert-Waters Act. The determination by lenders of "conforming" provisions in private flood insurance policies to assure they provide coverage "as broad as" a standard flood insurance policy issued under the NFIP is not something mortgage lenders are trained to do and no doubt this requirement will prove burdensome.

The American Bankers Association recently pointed out in its comment letter on the proposed rule that the requirement for a lender to conduct a detailed analysis and comparison of a private flood insurance policy offered by a borrower could lead to confusion for lenders and delays for borrowers in closing loans.

The most recent rule proposal includes a "compliance aid" provision intended to assist lenders in determining if a private flood insurance policy offered by a borrower is acceptable and meets the definition of "private flood insurance." If the following three criteria are met, then the policy meets the definition of "private flood insurance" under the Biggert-Waters Act:

1. the policy must be accompanied by a detailed written summary from the insurer stating how the policy meets the statutory definition of "private flood insurance";
2. the lending institution must verify No. 1 in writing; and
3. the insurance policy must state: "This policy meets the definition of private flood insurance contained in 42 U.S.C. § 4012(b)(7) and the corresponding regulation."

No doubt these new private flood insurance requirements, when they finally arrive, will require changes to be made in your policies and procedures in this area. Please call or e-mail [Jim Sheriff](mailto:jsheriff@reinhartlaw.com) at 414-298-8413 or jsheriff@reinhartlaw.com



if you have any questions about this e Alert.

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