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Comments:

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Lloyd's is submitting this comment letter in response to the Agencies' joint notice of proposed rulemaking regarding the Proposed Rule.

We appreciate the opportunity to provide comments on the Proposed Rule, which addresses the private flood insurance provisions of the Biggert Waters Flood Insurance Reform Act of 2012 (the "Act"). Lloyd's recognizes the Agencies' effort to implement the Act and address the comments submitted in response to the October 2013 Proposed Rule. However, we have serious concerns that the Proposed Rule, as drafted, is likely to have a detrimental effect on the private flood insurance market.

Lloyd's is the world's leading specialist insurance and reinsurance market and has been writing insurance in the US for over a century. In 2015, Lloyd's wrote more than \$15 billion in direct and reinsurance premiums in the US. For the past several years, Lloyd's has been the largest surplus lines insurer in the US. The Lloyd's market has proved an important source of support for the US following major natural catastrophes such as Hurricanes Katrina, Rita and Wilma, and Superstorm Sandy.

#### "Private Flood Insurance" Definition

As we noted in our 2013 comment letter, Lloyd's believes the definition of "private flood insurance" should be revised to explicitly state that residential coverage issued by eligible surplus lines insurers falls within the definition. This would be consistent with the language of the Act and Congressional intent.

The statutory definition of "private flood insurance" refers to coverage "issued by an insurance company that is licensed, admitted or otherwise approved to engage in the business of insurance" [emphasis added]<sup>1</sup>. Surplus lines insurers clearly fit within this definition as they are approved by virtue of being deemed eligible to write surplus lines insurance. The Nonadmitted and Reinsurance Reform Act ("NRRRA"), part of the Dodd-Frank Act, created nationwide eligibility standards for surplus lines insurers. The NRRRA provides that non-US or alien insurers are

deemed eligible to write surplus lines insurance throughout the US if they are included on the Quarterly Listing of Alien Insurers ("IID list") published by the International Insurers Department of the National Association of Insurance Commissioners. 42 U.S.C. 4012a(b)(7)(A)(i).

While the Act does not specifically reference surplus lines insurance in the statutory definition, in its deliberations over the Act Congress discussed this issue and clearly intended for surplus lines insurance to be included within the statutory definition of "private flood insurance." In Senate deliberations, for example, Senator Mike Crapo (R-ID) specifically addressed this issue by noting that surplus lines insurers provide coverage for residential properties, particularly when admitted insurers are unwilling or unable to provide the desired coverage.

Former Senator Tim Johnson (D-SD who at the time was the Chairman of the Senate Banking Committee) confirmed that "the definition of 'private flood insurance' includes private flood insurance provided by a surplus lines insurer and is not intended to limit surplus lines eligibility to nonresidential properties." 2 In view of the unambiguous statement of legislative intent and the Act's reference to insurers "otherwise approved to engage in the business of insurance," it is appropriate for the Act's implementing regulations to definitively state that coverage issued by eligible surplus lines insurers falls within the definition of "private flood insurance." The definition of private flood insurance in the Proposed Rule will create confusion among lenders as to whether they can accept private flood policies issued by surplus lines insurers for residential properties. Currently, there is very little capacity available from the admitted market for residential private flood coverage. The vast majority of private flood insurance for residential properties is written by surplus lines insurers. Thus, the Proposed Rule does not provide clarity where clarity is needed most. As such, it may actually restrict the growth of the private flood market if lenders decide to refuse surplus lines policies due to this lack of clarity.

Additionally, Lloyd's is concerned about the subjective nature of some of the factors for evaluating whether a private flood policy provides coverage "at least as broad as" an NFIP policy. These factors should be focused on objective policy terms, such as deductible limits, and should not require lenders to make subjective judgements which could result in inconsistent application. For example, the Proposed Rule provides that a private flood policy may not contain conditions that narrow the coverage provided in the NFIP's Standard Flood Insurance Policy. As lenders are not insurance professionals, it may be difficult for them to make a determination as to what policy terms might narrow coverage. Lloyd's is supportive of straightforward, objective requirements because they will be more easily implemented in a consistent manner.

#### Safe Harbor Provision

Lloyd's agrees that a "safe harbor" provision is necessary to promote the development of the private flood insurance market. However, in order to be useful in practice the safe harbor provision must be clear and must not place additional burdens on lenders who accept private flood insurance policies. In our view, the safe harbor provision in the Proposed Rule (entitled "compliance aid for mandatory acceptance") is not practical because it requires lenders to take on responsibilities that they likely will not be willing to assume.

The safe harbor provision as drafted provides that a policy is deemed to meet the definition of "private flood insurance" if 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; 2 158 Cong. Rec. S6051 (daily ed. Sept. 10, 2012).
- (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."

The requirements of criteria (1) and (3) are reasonable because they require the insurer, the purveyor of the private flood insurance product, to certify that the coverage meets the criteria of the definition. However, the second criterion is likely to render the entire safe harbor provision unworkable. This provision requires that lenders conduct their own independent evaluation of the private flood policy to determine whether they believe it meets the definition provided in the Proposed Rule. Lenders are not insurance professionals. They may not have staff with insurance expertise to perform this analysis, and even if a lender does have the capability to conduct this assessment they may choose not to take on this responsibility and the potential liability that comes with it. Lenders may be concerned that if they approve a private flood policy that is later found not to have met the definition of private flood insurance they will be held liable.

Therefore, it is much more likely that lenders will simply decline to accept private flood policies in order to avoid this risk. It will be much safer and more convenient for lenders to accept only NFIP policies. This will not only inhibit further growth in the private flood market but it will also cause disruption for policyholders that currently have private flood insurance as their lenders may no longer accept these policies.

In order to have the desired effect, the safe harbor provision needs to be re-drafted to avoid placing any burden of analysis or evaluation of the insurance policy on the lender. The safe harbor should be based on the insurer's certification. Removing criteria (2) would produce this result.

#### Discretionary Acceptance

Lloyd's appreciates the Agencies' inclusion of a discretionary acceptance for private flood insurance that does not meet the statutory definition of "private flood insurance." However, we believe that this discretionary acceptance is unworkable due to its circular nature. For example, the rule states that a private flood insurance policy must meet the criteria for the "at least as broad" threshold. If a policy can meet the requirements of the "at least as broad" threshold then it will likely meet the definition of "private flood insurance." This defeats the purpose for a discretionary acceptance. Furthermore, lenders will not be willing to take on the work of the evaluation required or the potential liability if their analysis is wrong. In short, this discretionary acceptance does not provide lenders the flexibility that is needed to encourage them to accept private flood insurance.

#### Conclusion

Lloyd's appreciates the Agencies efforts to implement the private flood provisions of the Act. Congress's clear intent in promulgating the private flood provisions of the Act was to promote the growth of the private flood market. We are concerned that the Proposed Rule will actually have the opposite impact - it will prevent the private flood market from growing and may even cause a restriction in the current capacity if lenders stop accepting private flood policies.

We urge the Agencies to make amendments to the Proposed Rule in order to create a workable solution that will encourage lenders to accept private flood insurance policies, including those issued by surplus lines insurers.