



Attorneys At Law

8584 Katy Freeway, Suite 420

Houston, TX 77024

Phone: 713-871-0005

Fax: 713-871-1358

Partners

Gregory S. Graham ¹

Shawn P. Black ²

Ryan Black ³

Senior Lawyers

David F. Dulock

Diane M. Gleason

Daniel S. Engle ⁴

Margaret A. Noles

Associates

Nick Stevens

Sydney Davis

Brandon Pieratt

Ambria Wilmore

Of Counsel

David M. Tritter

Calvin C. Mann, Jr.

Thomas E. Black, Jr. ⁵

Retired Partner(s)

Calvin C. Mann, Jr.

Thomas E. Black, Jr. ⁵

¹ Also Licensed in Georgia

² Also Licensed in Kentucky and New York

³ Also Licensed in District of Columbia

⁴ Also Licensed in New York

⁵ Also Licensed in New York and Washington

March 22, 2021

To: Clients and Friends

From: David F. Dulock

Subject: Federal Agencies Propose Interagency Questions and Answers Regarding Private Flood Insurance

In the March 18, 2021 issue of the *Federal Register* ([86 FR 14696](#)), the Office of the Comptroller of the Currency (OCC), Board of Governors of the Federal Reserve System (Board), Federal Deposit Insurance Corporation (FDIC), Farm Credit Administration (FCA), and National Credit Union Administration (NCUA), collectively the Agencies, propose to supplement the Interagency Questions and Answers Regarding Flood Insurance with new questions and answers regarding the acceptance of flood insurance policies issued by private insurers pursuant to the Agencies' private flood insurance final rule issued February 20, 2019. See our February 21, 2019 memorandum on the final rule on our website under the [Resources tab](#).

The Agencies invite interested parties to submit written comments on the proposed private flood insurance questions and answers on or before May 17, 2021. The addresses and methods for submitting comments to one or more of the Agencies is set out on pages 14696 and 14697 of the above hyperlinked *Federal Register*.

The Agencies drafted 24 proposed private flood insurance questions and answers (collectively Q&As and individually Q&A), categorized in the three following sections:

I. Private Flood Insurance—Mandatory Acceptance

The Agencies propose nine new Q&As to address issues regarding the mandatory acceptance and the application of the compliance aid assurance clause with respect to the private flood insurance final rule. The proposed Q&As would be designated as Mandatory 1 through Mandatory 9.

Mandatory 1 would address whether a lender may decide to only accept private flood insurance policies under the mandatory acceptance provision.

Mandatory 2 would address when a lender must review a flood policy issued by a private flood insurer, other than at loan origination, to make sure the policy meets the mandatory acceptance criteria.

Mandatory 3 would address whether the private flood insurance requirements require a lender to change its policy of not originating a mortgage in non-participating communities or coastal barrier regions where the National Flood Insurance Program (NFIP) is not available.

Mandatory 4 would address whether the compliance aid assurance clause could act as a conformity clause that would make a private policy conform to the definition of private flood insurance.

Mandatory 5 would address whether a lender is required to accept a flood insurance

(4 pages)

policy issued by a private insurer that includes the compliance aid assurance clause and whether a lender may reject a flood insurance policy issued by a private insurer solely because it does not contain the compliance aid assurance clause.

Mandatory 6 would address whether a lender is required to conduct an additional review of a flood insurance policy under the mandatory acceptance provision if the policy includes the compliance aid assurance clause and whether the lender may rely on the compliance aid assurance clause without further review of the policy if the language is different from the compliance aid assurance clause set forth in the private flood insurance final rule.

Mandatory 7 would address what additional reviews a lender must conduct when the flood insurance policy issued by a private insurer includes the compliance aid assurance clause.

Mandatory 8 would address whether a lender may use the criteria under the discretionary acceptance provision to decide whether to accept a flood insurance policy issued by a private insurer that does not contain the compliance aid assurance clause without first reviewing the policy to determine if it meets the mandatory acceptance provision.

Mandatory 9 would note that if the compliance aid assurance clause is included on the declarations page, a lender may accept the policy without further review to determine whether the policy meets the definition of private flood insurance; however, a lender must also ensure compliance with the mandatory purchase requirement.

II. Private Flood Insurance—Discretionary Acceptance

The Agencies propose four new Q&As to provide additional clarity on the discretionary acceptance provision of the private flood insurance final rule. The proposed Q&As would be designated as Discretionary 1 through Discretionary 4.

Discretionary 1 would address whether lenders are required to accept flood insurance policies that meet the discretionary acceptance criteria and would clarify that it is at the lender's discretion so long as the policy does not meet the mandatory acceptance criteria.

Discretionary 2 would address the requirements for documentation to demonstrate that a flood insurance policy provides sufficient protection of the loan, consistent with safety and soundness principles, when a lender accepts that policy under the discretionary acceptance criteria.

Discretionary 3 would address how a lender could evaluate the sufficiency of a private insurer's solvency, strength, and ability to pay claims in order to determine whether a flood insurance policy provides sufficient protection of the loan, consistent with general safety and soundness principles.

Discretionary 4 would address a lender's review and documentation requirements in regard to a flood insurance policy upon renewal if that policy was issued by a private insurer and was originally accepted in accordance with the discretionary acceptance requirements.

III. Private Flood Insurance—Private Flood Compliance

The Agencies propose 11 new Q&As on topics related to the private flood insurance final rule that are not covered in sections I and II above. The proposed Q&As would be designated as Private Flood Compliance 1 through Private Flood Compliance 11.

Private Flood Compliance 1 would address questions on the maximum deductible that a flood insurance policy issued by a private insurer can have for residential or commercial properties located in a Special Flood Hazard Area (SFHA) depending on whether the lender is accepting the flood insurance policy under the mandatory or the discretionary acceptance provision.

Private Flood Compliance 2 would clarify that a lender may require that the deductible of any flood insurance policy issued by a private insurer be lower than the maximum deductible for an NFIP policy under both the mandatory acceptance provision and the discretionary acceptance provision.

Private Flood Compliance 3 would provide guidance regarding whether a lender may charge fees to the borrower for the lender's use of a third party to review flood insurance policies.

Private Flood Compliance 4 would address the lender's responsibility to ensure a flood insurance policy issued by a private insurer meets the requirements of the private flood insurance final rule if the policy is not available prior to loan closing.

Private Flood Compliance 5 would provide guidance on whether a declarations page provides sufficient information for a lender to determine whether the flood insurance policy complies with the private flood insurance final rule.

Private Flood Compliance 6 would provide guidance on a lender's ability to accept a multiple-peril policy issued by a private insurer by clarifying that a lender may accept a multiple-peril policy that covers the hazard of flood under the private flood insurance provisions, provided the policy meets the requirements of the applicable Agency's flood insurance regulation.

Private Flood Compliance 7 would address the question of how the private flood insurance requirements would work in conjunction with requirements of secondary market investors—for example, the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation.

Private Flood Compliance 8 would provide guidance to servicers for loans covered by mandatory flood insurance. It would clarify that (1) for loans serviced on behalf of lenders supervised by the Agencies, the servicer must comply with the applicable Agency's flood insurance regulation in determining whether a flood insurance policy issued by a private insurer must be accepted under the mandatory acceptance provision or may be accepted under the discretionary acceptance or mutual aid provisions; and (2) for loans serviced on behalf of other entities not supervised by the Agencies, the servicer should comply with the terms of its contract with such an entity.

Private Flood Compliance 9 would explain how a lender could determine whether an insurer is licensed, admitted, or otherwise approved in a particular State, or whether a surplus lines or non-admitted alien insurer is permitted to issue an insurance policy in a particular State.

Private Flood Compliance 10 would address whether lenders may accept policies issued by private insurers that are surplus lines insurers for noncommercial residential properties.

Private Flood Compliance 11 would address whether a lender may accept a private flood insurance policy that includes a compliance aid assurance clause, but also includes a disclaimer that the “insurer is not licensed in the State or jurisdiction in which the property is located.”

Readers of this memorandum who intend to submit written comments on the proposed private flood insurance questions and answers are advised not to rely exclusively on this memorandum but to read the proposed Q&As and the preamble statements in the above hyperlinked *Federal Register*.

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