

# 2019 Flood Insurance Update

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In February 2019, the Office of the Comptroller of the Currency, the board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Farm Credit Administration, and the National Credit Union Administration (collectively, the Federal Financial Regulators) issued a joint final rule implementing provisions from the Biggert-Waters Flood Insurance Reform Act of 2012 (the Act) concerning mandatory acceptance of private flood insurance (PFI), discretionary acceptance of non-conforming flood insurance policies and discretionary acceptance of flood insurance policies issued by mutual aid societies (the Rule). The Rule becomes effective July 1, 2019, so lenders need to make necessary policy and procedure changes before that date in order to comply with the new regulations.

## Mandatory Acceptance of Private Flood Insurance

The Rule defines “private flood insurance” as an insurance policy that:

1. Is issued by certain insurance companies;
2. Provides flood insurance coverage at least as broad as the coverage available under a Standard Flood Insurance Policy (an SFIP) (i.e. one issued under the National Flood Insurance Program) for the same type of property;
3. Includes certain prescribed provisions; and
4. Contains cancellation provisions that are as restrictive as those found in an SFIP.

First, for a flood insurance policy to qualify as PFI, the policy must be issued by an insurer that is licensed or otherwise approved to write policies by the State in which the property to be insured is located, or, for certain non-residential commercial properties (i.e. difference in conditions, multi-peril risk, all risk or other blanket coverage), recognized or not disapproved as a surplus lines insurer by the State in which the property to be insured is located.

In addition, the coverage available under the flood insurance policy must be “at least as broad as” that afforded under an SFIP. In other words, the

Federal Financial Regulators set the coverage under an SFIP as the minimum coverage for a flood insurance policy to qualify as PFI. In determining whether a flood insurance policy's coverage is "at least as broad as" that of an SFIP, the lender must evaluate the policy's deductibles, exclusions and conditions. The policy must also define the term "flood" as, at a minimum, including the events identified in the SFIP definition of "flood." Moreover, the deductible for the flood insurance policy may not exceed the deductible for the same level and type of coverage as that in an SFIP, the policy cannot include any exclusions not found in an SFIP, and the policy cannot contain any conditions that narrow the scope of coverage provided for in an SFIP.

Further, the flood insurance policy must contain certain provisions in order to be considered PFI, including (1) a requirement of 45 days written notice prior to cancellation or non-renewal, (2) information about the availability of flood insurance coverage under the National Flood Insurance Program, (3) a mortgage interest clause similar to that used in an SFIP and (4) a requirement that the insured must file suit within one year of the date of a written denial of all or part of a claim.

Finally, the cancellation provisions of the flood insurance policy must be at least as restrictive as those in an SFIP.

If a flood insurance policy satisfies all of these conditions, the lender *must* accept it for purposes of complying with its flood insurance obligations. While this may seem to be a daunting task, the Federal Financial Regulators allow insurers to include the following endorsement in the flood insurance policy, upon which the lender may rely in determining whether a policy meets the criteria for PFI: *"This policy meets the definition of private flood insurance contained in 42 U.S.C. 4012a(b)(7) and the corresponding regulation."* While the lender may rely on this endorsement to conclude that the flood insurance policy qualifies as PFI, its absence does not necessarily mean that the flood insurance policy does not in fact qualify as PFI.

## Discretionary Acceptance of Non-Conforming Flood Insurance Policies

If a flood insurance policy fails to satisfy the definition of PFI, the lender *may* accept the policy to satisfy its flood insurance obligations when (1) the policy provides the required amount of coverage, (2) the policy is issued by an insurer qualified to issue a PFI, (3) the policy covers the mortgagor and mortgagee as loss payee (except for certain policies for condominiums and cooperatives) and (4) the lender determines that the policy provides adequate protection of the designated loan consistent with safety and soundness considerations and documents its conclusion in writing.

## Discretionary Acceptance of Plans from Mutual Aid Societies

A lender *may* accept a plan issued by a "mutual aid society" for purposes of complying with the lender's flood insurance obligations. A "mutual aid society" is an organization:

1. Whose members share a common religious, charitable, educational or fraternal bond;
2. That covers losses caused by damage to members' property pursuant to an agreement, including damage caused by flooding, in accordance with this common bond; and
3. That has a demonstrated history of fulfilling the terms of agreements to cover losses to members' property caused by flooding.

In order for the lender to accept a plan from a “mutual aid society,” the lender’s primary federal regulator must first determine that the plan qualifies as flood insurance. In addition, the plan must provide the required amount of coverage and cover both the mortgagor and mortgagee as loss payee. Finally, the lender must determine that the plan provides adequate protection of the designated loan consistent with general safety and soundness considerations, and documents its conclusion in writing.

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*Matt Ormiston tailors his efforts to meet the special needs of the firm’s clients working within the agricultural industry, particularly those within the Farm Credit System. \*Licensed in Texas only.*

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*As the chair of Nexsen Pruet’s Agribusiness industry team, David Gossett’s law practice is focused on representing lending institutions that provide financing that fuels America’s economy, including some of the larger agribusinesses in the country. He recognizes that without a qualified lender, it is practically impossible for businesses to start, grow or expand. \*Licensed in North and South Carolina.*