

NATIONAL CONFERENCE OF INSURANCE LEGISLATORS
SPECIAL COMMITTEE ON NATURAL DISASTER RECOVERY

Draft: Private Flood Insurance Model Act

Annual Meeting

December 11, 2019

On behalf of National Association of Mutual Insurance Companies (NAMIC)¹ members, thank you for the opportunity to review the draft Private Flood Insurance Model Act circulated in the meeting's 30-Day Materials package.

NAMIC's message to the group is somewhat nuanced.

- NCOIL is moving in a constructive direction when comparing this draft to those in earlier discussions. NAMIC appreciates the work and thought that went into this document.
- If the goal of passing a model is to make available a tool for state legislators that they might introduce and pass in the states, endeavoring to help facilitate the creation of a diverse and robust private flood insurance market, the pending document may require some further drafting before meeting that objective.
- While there are positives to what is drafted, it may not clearly account for the full range of private flood insurance products that could protect consumers in the future and/or the full range of the ways legislative and regulatory structures might support the efforts to bring forth and maintain those products in the marketplace.

Below NAMIC sketches important principles and asks that the proposal and other materials presently before this Committee be assessed against them.

¹ NAMIC is the largest property/casualty trade association in the US, serving regional and local mutual insurance companies on main streets across America as well as many large national insurers. NAMIC membership includes more than 1,400 insurance companies. NAMIC member companies write \$268 billion in annual premiums. Our members account for 59% of homeowners, 46% of automobile, and 29% of business insurance markets.

ELEMENT: FORM DESIGN DIVERSITY & FORM FILING REGIME

Principle - Policy form flexibility allows insurers to design products that best meet consumer needs.

Restrictions on form freedom inhibit product innovation and/or may increase costs. Insurers considering choosing to devote resources to the flood market might want to consider different ways to meet the needs of diverse consumers. For example, some consumers looking for lower cost options may choose higher deductibles, limitations on coverage, terms that differ from NFIP, or coverage only in excess of the minimum NFIP. Other consumers, those without mortgages, may want product choices beyond those that are accepted by lenders. To design the regulatory structure to facilitate a private flood insurance market, streamlined filing approaches and timelines [if filings are required] would signal the importance of moving these products through any filing submission/waiting/review process so that they can be offered in the market.

Current Proposal (Section 5) & Principle – Section 2 of the draft model indicates that the model’s purpose is: “to encourage a robust private flood insurance market to provide consumer choices and alternatives to the existing National Flood Insurance Program.” While this purpose is laudable, the current draft could more closely echo this sentiment.

For example, Section 5 mentions that the scope is limited to “an insurance policy, contract, or endorsement that at least meets the private flood insurance requirements as specified in 42 U.S.C. s. 4012a(b) [NFIP].” There are a few ways this wording might be confusing or problematic.

Inclusion of Discretionary Acceptance Policies - The interests of the private flood market would be well served by explicitly incorporating into the proposed model those policies that meet the “Discretionary Acceptance” definition under the federal rule.

For your background, earlier this year, five agencies – the Federal Reserve,² Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency, National Credit Union, and Farm Credit Administration – issued the rule requiring lenders to accept private flood insurance policies in addition to National Flood Insurance Program policies. It went into effect on July 1. Current regulations prohibit federally regulated lenders from making loans on properties in certain areas unless the property has adequate flood insurance coverage. The new rulemaking includes a streamlined compliance provision designed to help lending institutions evaluate whether a flood insurance policy meets the definition of private flood insurance. The rule provides for mandatory acceptance in certain situations and for discretionary acceptance in some others. Specifically, the final rule permits lenders to accept flood insurance policies issued by private insurers, even if the policies do not meet the statutory and regulatory definition of “private flood

² See: 12 CFR Part 208.

insurance.”³ Lenders can do so as long as the policy provides sufficient protection for a designated loan consistent with general safety and soundness principles, along with a requirement that the regulated lending institution document in writing its conclusion regarding the sufficiency of protection.

Based on recent feedback and if moving forward with a model, NAMIC would like to review the referenced statutory section and may provide additional comment to the Committee about that referenced section. Regardless, the absence of a discretionary acceptance option might raise questions regarding a possible interpretation limiting the model to apply only to “mandatory acceptance” policies and not to also incorporate “discretionary acceptance policies.”

“At Least Meets” Wording – Another possible source of confusion might arise from the “at least meets the private flood insurance requirements” wording which might be interpreted differently from the “at least as broad as the coverage offered by an NFIP flood insurance policy” wording that appears in the above referenced federal rules under which lenders may also accept private insurance that meets the “Discretionary Acceptance” definition. This distinction may be important for some insurers with a product designed with higher deductible options and/or a shorter cancellation notice for nonpayment of premiums. Again, both policies that meet the “Private Flood Insurance” definition and the “Discretionary Acceptance” definition can be accepted under the new rule. If moving forward with the model, this may be another area on which NAMIC may ask to provide additional feedback.

Others’ Suggested Amendment: Scope – NAMIC understands that an item possibly under discussion is an amendment regarding the applicable scope of the model, along the lines of the following:

The [State entity for regulating insurance] may require, through the application of the State’s existing regulatory system, that an insurer file the forms for this coverage and that an authorized insurer may issue an insurance policy, contract, or endorsement and, for residential properties required to have flood insurance that are located within a Special Flood Hazard Area designated by the Federal Emergency Management Agency, that ...

This suggestion raises a threshold question that may invite additional drafting. Specifically, what does it mean to be private flood insurance outside the scope of the proposed model? Does it mean that such insurance may not be written in a state? Or, does it mean that it may be written but that other laws of the state would apply? Clarification along the lines of the latter approach may be helpful in guiding future interpretation.

³ The 1973 Flood Disaster Protection Act mandates that federally regulated or insured lenders require the purchase of flood insurance on properties located in high risk flood areas. The mandatory purchase requirement did not require that insurance to be provided by the NFIP, and in 2012, the Biggert-Waters Act made the acceptance of private flood insurance mandatory if the policy met certain criteria. But the mandate was conditioned upon issuance of final regulations, which were not issued until now.



Along these same lines, NAMIC understands that another suggestion was submitted regarding Surplus Lines Placements. As a technical item, it might be worthwhile to consider in the drafting process how this might work in the context to the “authorized insurer” scope. (NAMIC is not suggesting that the drafting be revised to sweep surplus lines into the substantive requirements of the proposal.)

Others’ Suggested Amendment: Filing Requirements & Drafting Note – Another example of a way in which the current proposal might differ from the forms principles articulated above might be a lack of clarity regarding a streamlined approach to filing. It currently reads, “The [State] may require, through the application of the State’s regulatory system, that an insurer file the forms for this coverage...” The wording seems to imply that the filings and review would follow the same approach as in place under the law today. Especially if the product design options are limited as discussed above and/or the purpose provided in Sec. 2 is to be brought to fruition, it seems persuasive that a more accelerated filing regime might be allowable. NAMIC understands that a possible amendment possibly under discussion is the inclusion of a drafting note to correspond to Sec. 5, along the lines of the following:

DRAFTING NOTE: In the interest of facilitating the growth of the private flood market, the intent of this section is to ensure that states do not impose greater filing requirements for private flood insurance form filings than the state requires for other property lines of insurance. However, states may also wish to consider further streamlining the filing requirements for personal and commercial flood insurance in order to enhance insurers’ ability to develop private flood policies and endorsements that would provide consumers with choices when compared to the protection provided by the federal government’s National Flood Insurance Program.

Comment on Possible Amendment – NAMIC believes that this drafting note would be a helpful addition to the model. Yet, rather than defaulting to the status quo while mentioning additional modernization possibilities, NAMIC would prefer the Committee to set forth an accelerated form filing approach in the text of the model.

ELEMENT: RATE FLEXIBILITY & RATE FILING REGIME

Principle – Rating flexibility allows insurers to price products more accurately. Given the exposure insurers writing flood insurance face, the ability to price for the risk is critical. The Federal Government’s market dominance should serve as a check on the emerging private market. Consistent with the notion of diversity in pricing approaches, each insurer should be able to determine relevant rating factors. Such an environment is more likely to encourage a private flood insurance market to grow; restrictions on factors and approaches may hamper or inhibit more capital from entering the private flood insurance market. To design the regulatory structure to facilitate a private flood insurance market, streamlined filing approaches and timelines [if filings are required] would signal the importance of moving these products through any filing submission/waiting/review process so that they can be offered in the market.

Current Proposal (Section 4 and possibly Section 6) & Principle – The current proposal indicates in (a) that the rates are not subject to prior approval and in (b) that a use and file approach would apply for rates changes. While

on its face this may seem consistent with the principle, as a practical matter it may leave some open questions. For example:

Under Section 4, it is unclear what filing regime would apply to new rates. However, Subsection 6(a) mentions a default floor of file thirty days in advance or consistent with the state's rating law (in the context of informing the state of an intention to sell private flood insurance). If the intent of this subsection is to address rates for a new product or program, perhaps it could be incorporated into Section 4 consistent with the rating principle above.

While the wording in Section 4 indicates "not subject to prior approval," as a practical matter the execution of a "file and use" regime without more specificity may be used to the same effect as prior approval.

There may be several areas where NAMIC would prefer to see additional wording. For example, incorporating confidentiality language as well as indicating the standard for the referenced attestation.

ELEMENT: UNDERWRITING FLEXIBILITY & FILING REGIME

Principle – Underwriting flexibility is essential for insurers to appropriately select and place risks. In considering underwriting issues, states may have different ways they handle cancellation and non-renewal of homeowners insurance. Some may outright prohibit cancellation or non-renewal, absent very rare circumstances, after a policy has been in effect for a certain period of time. Others currently prohibit weather claims from being used. States wishing to foster a private flood insurance market should not extend these restrictive approaches to flood insurance.

Current Proposal (None) & Principle – As it stands, the current proposal is silent in this area.

Distinguishing Between Flood & Homeowners Requirements - As you consider possible barriers to the residential private flood insurance market, kindly note that in some state laws there may not be a clear delineation between Flood and Homeowners coverage. In some states, homeowners coverage regulations also may have been made applicable to flood coverage because there may not be a clear enough distinction. Turning to one example, this may become an issue when there are limitations on underwriting that relate to losses being catastrophic or weather-related. Since flood coverage is basically responding solely to catastrophic or weather-related loss situations, a lack of distinction may disincentivize carriers from entering the marketplace, as they may wonder if their hands may be tied on who they could write, and what future actions they may be permitted to take.

Filings & Confidentiality - If moving forward with a model, it may be worthwhile to specify that underwriting guideline filings are not required or that to the extent such guidelines are provided to a Commissioner that be held as confidential. By its nature, this information is proprietary and trade secret.



ELEMENT: LOSS MITIGATION APPROACH

Principle – Insurers should have flexibility in whether and how to require consumers to take loss mitigation steps and in whether and how to handle such steps in its forms, underwriting, and rating. For instance, given the risk of catastrophic losses and the possibility to reduce the likelihood of damage to an insured risk, insurers should be permitted to require policyholders to undertake or maintain loss mitigation efforts as a condition of coverage within a policy form. In some situations, loss mitigation may provide insurers a way to offer lower premiums; it also may give policyholders incentives to make efforts to avoid damage before a disaster.

Current Proposal (None) – The current proposal is silent on this point.

If moving forward with a model, this may be an area NCOIL may want to consider including.

OTHER: NOTICE & CERTIFICATION

Current Proposal (Section 7) – As drafted, Section 7 sets for several “Duties of Producer.” As drafted, NAMIC offers no comments at this time about the proposed requirements (a)-(c). However, NAMIC suggests that “best practice” wording not be imbedded into legislation; such an approach may have the effect of inviting litigation.

Others’ Suggested Amendment (Replacement to Section 7) – NAMIC understands that an item possibly under discussion is to replace Section 7 with several other provisions. NAMIC asks for an opportunity to review these provisions with member companies.

As a preliminary matter though, NAMIC would like to express concerns over the concept of an insurer being required to provide notice of a competitor’s rates, as contemplated in the following:

Before placing a personal lines private flood insurance policy with an insurer, an insurance producer, surplus lines broker, or insurer must provide a written notice to the applicant advising that, if the applicant discontinues coverage under the National Flood Insurance Program that is provided at a subsidized rate, the full risk rate for flood insurance may apply to the property if the applicant later seeks to reinstate coverage under the program.

In an initial review of the suggested “Notice to Consumers” provision (A), respectfully, an insurer generally is not obligated to inform an applicant of the possible rating ramifications of changing insurers. For example, by shopping and switching carriers for a traditional homeowners policy, today a customer may walk away from current or future loyalty or a multi-policy discount. The notice described not only adds to the administration of the private flood process, but it may give



a government competitor a relative benefit. If moving forward with adding this provision, NAMIC asks the Committee to not to include “insurer” in this provision.

Also, NAMIC questions a proposal that mandates a 45-day cancellation or nonrenewal minimum for all types of private flood insurance coverage and regardless of the reasons for such action (consistent with the underwriting discussion above).

Current Proposal (Section 8 – Other Provisions – Certification for Federal Disaster Assistance) - Subsection 8(b) may cause confusion. Is this wording speaking to a certification that carriers can seek from state insurance departments, in order to more easily communicate to lenders that the policy is at least as broad as NFIP, as a condition of qualifying for federal disaster assistance? Is this provision stating that if one is covered by a discretionary acceptance policy, that they may not seek federal disaster assistance in addition? If it is somehow limiting the treatment of a private policy based upon whether or not it has been certified by the state, it is unclear why discretionary acceptance policies would be certified by the state. Based on articulated member confusion regarding this provision, NAMIC suggests additional review could be beneficial.

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Competition is an essential idea underpinning a robust private market. In addition to risk-based price competition, products themselves might differ. This variety in product design potentially may invite more insurer capacity/writing and a wider range of consumer choice.

Thank you for your consideration of NAMIC’s comments outlining some observations and questions regarding the proposed model. NAMIC remains available to discuss this important coverage and how to facilitate a vibrant private flood insurance market with the Committee.