December 22, 2010

Regulations Division
Office of General Counsel
Department of Housing and Urban Development
451 7th Street, S.W.
Room 10276
Washington, D.C. 20410-0500

Re: **Docket No. FR-5459-N-01**
Real Estate Settlement Procedures Act (RESPA): Solicitation of Information on Changes in Warehouse Lending and Other Loan Funding Mechanisms

Ladies and Gentlemen:

The Mortgage Bankers Association (MBA)[1], the American Bankers Association (ABA)[2] and the Housing Policy Council of the Financial Services Roundtable (HPC)[3] (collectively, the Associations) appreciate the opportunity to respond to the Department of Housing and Urban Development's Solicitation of Information on Changes in Warehouse Lending and Other Loan Funding Mechanisms. The purpose of the solicitation is to help the U.S. Department of Housing and Urban Development (HUD) decide whether to issue guidance under the Real Estate Settlement Procedures Act (RESPA) to address the changes that have occurred since it last issued regulations specifically related to warehouse lending and

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[1] The Mortgage Bankers Association is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership and extend access to affordable housing to all Americans. Its membership of over 2,200 companies includes all elements of real estate finance: mortgage companies, commercial banks, thrifts, Wall Street conduits, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's Web site: www.mortgagebankers.org.

[2] The American Bankers Association represents banks of all sizes and charters and is the voice for the nation's $13 trillion banking industry and its two million employees. American Bankers Association's extensive resources enhance the success of the nation's banks and strengthen America's economy and communities.

[3] The Housing Policy Council (HPC) of The Financial Services Roundtable is a national trade association consisting of thirty-two of the leading national mortgage lenders, mortgage insurers and mortgage service providers. HPC members originate, service, and insure mortgages. We estimate that HPC member companies originate approximately 75% and service two-thirds of mortgages in the United States.

other loan funding mechanisms in 1992 and 1994 and to help HUD formulate any such guidance.[4]

HUD's solicitation raises the core question of whether warehouse lenders are engaged in table funding when they extend credit to mortgage lenders and thus subject to the provisions of RESPA. The Associations believe that it is important for HUD to recognize that warehouse lenders make commercial loans to mortgage lenders to facilitate secondary market transactions and they are not engaged in table funding when they do so. The relationship of a warehouse lender to a mortgage lender is in no way the same as the relationship of a wholesale lender to a mortgage broker, which is the context that gave rise to the table funding provisions contained in the RESPA rules. Accordingly, these activities should not be subject to RESPA.

1. Introduction. RESPA regulations presently exclude from coverage a *bona fide* transfer of a mortgage loan in the secondary market. In determining what constitutes a *bona fide* transfer, the rules say HUD will consider the real source of funding and the real interest of the funding lender. Mortgage broker transactions that are table-funded are not secondary market transactions. 24 CFR § 3005.5(b)(7). RESPA rules also exclude "business purpose loans" from coverage. 24 CFR § 3005.5(b)(2). The RESPA rules incorporate Truth in Lending Act (TILA) rules for determining whether an extension of credit is primarily for a business, commercial, or agricultural purpose. 12 CFR 226.3(a)(1).

We understand that at the request of a federal banking regulator, HUD has been asked to focus in particular on whether a warehouse lender who provides funds to the closing table pursuant to an agreement that uses "sale" language is a table funding that renders the warehouse lender the "mortgage lender" and renders the mortgage lender a "mortgage broker."[5]

Future HUD guidance should not subject warehouse lenders generally, or warehouse repurchase or purchase and sale structures[6] in particular, to RESPA

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[4] Note that the Associations have included a table at the end of this letter referencing specific questions from the solicitation and specifying where the responsive information is contained in this letter.
[5] It is our understanding that HUD is focusing, in particular, on warehouse facilities that contain sales language as warehouse facilities that are structured as traditional lines of credit clearly are exempt from RESPA as "business purpose loans." As set forth in greater detail below, the Associations' position is that the substance, rather than the form, of the warehouse facility should be determinative of the issue.
[6] The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "Bankruptcy Reform Act") amended the definition of "repurchase agreement" contained the United States Bankruptcy Code (12 U.S.C. §101(47)) to include mortgage loans and interests in mortgage loans. "Repurchase agreement" is used herein as defined in the Bankruptcy Code ("an agreement…which provides for the transfer of one or more…mortgage loans…[or]…interests in mortgage loans…against the transfer of funds by the transferee of such…mortgage loans, or interests, with a simultaneous agreement by such transferee to transfer to the transferor thereof mortgage loans, or interests of the kind described in this clause, at a date certain not later

coverage. Warehouse lending is business-to-business lending to facilitate the origination and ultimate sale of mortgages by mortgage lenders into the secondary market. It is wholly distinguishable from table funding of mortgage brokers as described below. Subjecting warehouse lending to RESPA coverage will impose new disclosure obligations and liability on warehouse lenders that are inapposite to their functions and capabilities. Such coverage will increase costs to such an extent that warehouse lending is unlikely to continue as an economically viable model.

This issue is of particular importance because of the prevalence of warehouse lending, its importance to a wide array of lenders and the competitive mortgage market itself. Repurchase and purchase and sale structures are a form of warehouse lending that were created because of a range of concerns having nothing to do with RESPA. If warehouse lenders are forced to abandon these alternative structures, many would exit the market rather than expose themselves to the risks inherent in different models. Any exodus of warehouse lenders from the market would severely limit the availability of funds for mortgage lending, harm consumers and jeopardize recovery of the nation's housing markets.

2. Warehouse Lending. Warehouse lending involves the extension of a revolving commercial credit or interim financing arrangement by a commercial bank or other financial institution (warehouse lender) to a mortgage lender that receives advances under the arrangement to extend mortgage loans to consumers (mortgage lender). These arrangements allow mortgage lenders to borrow money on a short term basis to fund mortgage loans pending their sale into the secondary market.

Warehouse credit facilities may be structured as traditional lines of credit, as master repurchase agreements, as purchase and sale agreements or as participation agreements. None of these arrangements involve table funding. The relationship of a warehouse lender to a mortgage lender is in no way the same as the relationship of a wholesale lender to a mortgage broker, which is the context that gave rise to the table funding provisions contained in the RESPA rules. As distinguished from table funding, a warehouse lending transaction has the following characteristics:

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than 1 year after such transfer or on demand, against the transfer of funds"). Loans held by a warehouse lender pursuant to a repurchase agreement are not subject to the automatic stay in bankruptcy. Repurchase agreements also provide additional protections for the warehouse lender. Warehouse advances may also be structured as "purchase and sale" transactions, with a provision that allows the warehouse lender to require repurchase of any loan by the mortgage lender to whom a warehouse advance was made in the event that the mortgage lender is unable to arrange for a secondary market sale of that loan within a specified time period.

- The mortgage lender receives an advance from the warehouse lender that is less than the fair market value of the mortgage loan, which advance is repaid upon the sale of the mortgage loan by the mortgage lender in the secondary market;

- The mortgage lender pays some form of interest on the advance from the warehouse lender, but that interest does not vary based on the terms of the mortgage loan or any gain or loss experienced by the mortgage lender on the sale of the mortgage loan in the secondary market;

- If the mortgage lender defaults and the warehouse lender sells the mortgage loans, proceeds in excess of the amount owed to the warehouse lender are paid over to the mortgage lender. Likewise, if the mortgage lender defaults and the warehouse lender sells the mortgage loans for less than the amount owed to the warehouse lender, the shortfall is the responsibility of the mortgage lender;

- The risks and benefits of any changes in the market value of the mortgage loan remain with the mortgage lender and the mortgage lender is subject to a "margin call" if the mortgage loan drops in value while still on the warehouse line or if there is a breach of a representation or warranty;

- A warehouse advance may remain outstanding under the warehouse credit arrangement for not more than a definite period of time, generally between 30 and 60 days in today's market;

- The warehouse lender generally will not make a warehouse advance to the mortgage lender in the absence of a firm commitment to the mortgage lender from an investor;

- In repurchase agreement transactions, the mortgage lender unconditionally repurchases the mortgage loan at the end of the stated period if the mortgage lender has not sold the mortgage loan to an investor (though the period may be shortened and the mortgage lender may be required to repurchase the mortgage loan sooner if a default occurs);

- In purchase and sale transactions, the mortgage lender is required to arrange for, and close, the sale of the mortgage loan in the secondary market within a specified period. The failure to sell the loan constitutes an event of default that allows the warehouse lender to demand repurchase of the mortgage loan;

- In all cases, the economic effect of the structures is the same—the mortgage lender receives the benefits (and takes the risks) of being the originator and seller of the loan in the secondary market; and

- In the absence of a default, the mortgage lender also retains the right to determine to whom the loan will be sold and at what price and to direct the delivery of the mortgage documents to the investor under a bailee letter.[7] The ultimate purchaser of the loan deals only with the mortgage lender and the mortgage lender remains fully responsible to that ultimate purchaser to provide any necessary representations and warranties.

Accordingly, what separates a bona fide warehouse line from a table funding transaction is that the mortgage lender, absent default under its warehouse line, retains the benefits, rights and obligations of ownership of the loan pending the sale of the loan into the secondary market while the warehouse lender provides temporary financing in contemplation of the secondary market transaction. While warehouse credit facility structures may have changed over the years for bankruptcy protection or bank regulatory purposes, the underlying substance of the transactions has not—the mortgage lender originates the mortgage loan and retains responsibility for such loan pending secondary market sale.[8]

3. The Associations' Position. As set forth above, warehouse lenders make commercial loans to mortgage lenders to facilitate secondary market transactions and they are not engaged in table funding when they do so. Accordingly, their activities should not be subject to RESPA.

If HUD were to determine that warehouse lending structures, whether or not they involve warehouse lenders "purchasing" loans or interests in loans, constitute "table funding," it would have an extremely negative effect on the mortgage industry—particularly for smaller mortgage lenders who rely on warehouse lenders and consumers who benefit from a competitive market. Many

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[7] Note that the mortgage note and the mortgage/deed of trust are assigned in blank and are transferred either to the warehouse lender or to a custodian on behalf of the warehouse lender. This helps to ensure that the mortgage lender is not able to pledge or "sell" the underlying mortgage loan more than once and to ensure that the warehouse lender has immediate access to the mortgage loans following an event of default or a bankruptcy. Note also that while a warehouse lender can perfect a security interest by filing a UCC1, that interest will always be subject to "priming" by a security interest that is perfected by possession. As a result, all prudent warehouse lenders take possession of the mortgage note and require an assignment of the mortgage/deed of trust—the possession is not an indicator of true ownership, but rather is simply a "must" in order to ensure a perfected security interest.

[8] Warehouse lenders generally approve the mortgage lender's underwriting guidelines or require that the originator comply with the requirements of the applicable GSE or committed investor. Sometimes additional due diligence is provided on a pre- or post-closing basis to ensure collateral quality. As with taking possession of the mortgage note, the due diligence and re-underwriting of loans is not an indicator of ownership, but is instead merely the act of any prudent lender that wants to ensure the quality of its collateral.

participants in the warehouse lending market are likely to choose to exit the industry if the protections afforded repurchase agreements and purchase and sale agreements are not available because of HUD regulations.

One of the reasons that liquidity has started to return to the warehouse lending market is the certainty provided by the Bankruptcy Reform Act and by the bankruptcy and other cases that have upheld the use of master repurchase agreements and purchase and sale agreements. If the use of financing vehicles other than traditional lines of credit are deemed "table funding" because the loans are deemed "owned" for some transient period of time, capital will once again flee the market because traditional credit lines simply do not provide the protection that today's volatile market requires.

Requiring disclosure by a warehouse lender to the mortgagor would, in fact, result in increased confusion. The mortgagor has no relationship with the warehouse lender, the warehouse lender is not the real party in interest, the warehouse lender has no contact with any of the settlement service providers and the warehouse lender has no control over the mortgage borrower's interest rate or the approval or disapproval of the mortgage loan. The additional costs of consumer level disclosure and originator liability—including state licensing, recordkeeping, and liability for consumer level disclosures (required by RESPA, TILA and state laws)—will result in costs and exposure that will render warehouse lending so expensive that it will no longer be an economically viable model.

4. Solution. The Associations strongly support clarification by HUD that warehouse advances are exempt from RESPA. Clarification will ensure the continuation of an active warehouse lending market. The Associations believe HUD may rely on current exemptions or create a new exemption for this purpose. As set forth above, both the business purpose loan and secondary market exemptions provide a basis for HUD to exempt these transactions from RESPA. If HUD chooses to establish a new exemption for warehouse advances, the exemption should clearly recognize the economic distinctions described above and should provide that warehouse advances, regardless of their structure, are not table funded transactions but instead are transactions for the purpose of providing liquidity to the loan origination market that facilitate secondary market sales and healthy competition, lowering costs for consumers.[9]

[9] Note that while some affiliates or correspondent divisions of warehouse lenders are sometimes involved in purchasing loans from mortgage lenders to whom the warehouse lender provided warehouse financing, correspondent sales are generally handled pursuant to a separate agreement with the originator. While the number of days varies, the correspondent transactions are not concurrent with the warehouse lending transaction—some period of time always elapses before the secondary market purchase closes. As warehouse lending interest rates/price differential have increased while the rates to consumers have decreased, originators are often forced into a "negative arbitrage" situation in which they are lending money

The Associations appreciate the effort of HUD in considering this issue. We look forward to working with you to advance our mutual goal of growing warehouse lending market that increases competition, resulting in better choices for consumers.

Please contact the undersigned or Ken Markison at (202) 557-2930 or kmarkison@mortgagebankers.org or Tamara King at (202) 557-2758 or tking@mortgagebankers.org if you have any questions.

Most sincerely,

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for less than they are paying to borrow it, so originators prefer to keep the period of time between the closing of a mortgage loan and the sale to a correspondent to a minimum. Regardless of the number of days that pass between the warehouse advance and the purchase of the loan by the warehouse lender's affiliate or correspondent division, the economic effect of the warehouse transaction remains the same as in the transactions described above.

Cross-Reference Table to Questions Presented in Solicitation	
HUD Solicitation Question Number	Responsive Paragraph/Footnote Number
1(a)	2; Footnotes 5 and 6
1(b)	2; Footnotes 6 and 7
1(c)	2; Footnotes 6 and 7
1(d)	1; 2; Footnotes 6 and 7
1(e)	2; Footnote 8
1(f)	1; 2; 3; Footnotes 6, 7 and 8
2	2; 3; Footnotes 6 and 7
3	1; 2; 3; 4; Footnotes 6, 7, 8 and 9
4	2; 3; Footnotes 6, 7 and 8
5	1; 2; 3
6	1; 2
7	2
8	2; 3; Footnotes 6 and 7
9	1; 2; 3
10	1; 4