**December 23, 2010**

**Via E-Mail: www.regulations.gov**

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

Re: Department of Housing and Urban Development Solicitation of Information on Changes in Warehouse Lending and Other Loan Funding Mechanisms

Ladies and Gentlemen:

The Securities Industry and Financial Marketing Association ("SIFMA")[1] submits this letter on behalf of its members in response to the solicitation of information by the Department of Housing and Urban Development ("HUD") pursuant to its notice in the Federal Register 75 F.R. 71724 (the "Notice"). We understand that HUD is considering the issuance of guidance under the Real Estate Settlement Procedures Act of 1974, as amended ("RESPA") to address changes in warehouse lending and other financing mechanisms used to fund federally related mortgage loans that have occurred since HUD issued regulations specifically related to this area over 15 years ago. The Notice focuses on financing mechanisms that may have the attributes of sales, with a particular emphasis on the exemption under RESPA for "secondary market transactions." We are providing this response to ensure that providers of traditional, bona fide funding mechanisms for non-depository mortgage lenders are not recharacterized as mortgage lenders under RESPA.

[1] SIFMA brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit www.sifma.org.

# I. BACKGROUND

## A. Secondary Market Transactions under RESPA

The anti-kickback provisions in Section 8 of RESPA prohibit (i) the giving or receiving of any fee or other "thing of value" in return for the referral of settlement service business, and (ii) the splitting of unearned fees, in connection with federally related mortgage loans.[2] Sections 4 and 5 of RESPA require certain disclosures in connection with the provision of settlement services pertaining to the origination of federally related mortgage loans.[3]

These prohibitions and requirements, however, apply only to "settlement services." RESPA defines the term settlement service to include "any service provided in connection with a real estate settlement . . . ."[4] HUD regulations expand the statutory definition to include, among other things, the "[p]rovision of any other services for which a settlement service provider requires a borrower or seller to pay."[5] Mortgage broker transactions constitute settlements services under RESPA, but bona fide transfers of loans in the secondary market (referred to in HUD's Regulation X as secondary market transactions) are not settlement services.[6] Not all loans in which the seller of the closed loan is the initial payee on the promissory note and treated as the creditor under other consumer credit laws are treated by HUD as secondary market transactions and exempt from RESPA. HUD regulations instead look to the "real source of funding" and the "real interest of the funding lender."[7] Using that test, HUD considers a mortgage broker transaction to include a "table funded" loan involving a settlement at which a loan is funded by a contemporaneous advance of loan funds and an assignment of the loan to the person advancing the funds. The Notice asks how warehouse loans and other funding mechanisms that directly or indirectly provide funds to residential mortgage lenders to fund residential mortgage loans should be treated under RESPA.

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[2] 12 U.S.C. § 2607(a) and (b).

[3] 12 U.S.C. 2603 and 2604.

[4] 12 U.S.C. 2602(3).

[5] 24 C.F.R. § 3500.2.

[6] *See* 24 C.F.R. §§ 3500.2 and 3500.5(7).

[7] *Id.*

### B. Warehouse Lending and Other Funding Mechanisms

In this section, we provide responses to the questions asked by HUD in the Notice

Residential mortgage lenders that do not have access to customer deposits or other internal liquidity, such as state-chartered mortgage companies or other specialty finance companies ("Residential Mortgage Banker(s)"), require or rely on third party financing in order to lend to consumers. There are a variety of financing mechanisms that are available to Residential Mortgage Bankers to allow Residential Mortgage Bankers to make and fund individual loans that meet prescribed eligibility criteria. This letter provides a general description of some of these mechanisms and then identifies their common characteristics.

#### *1. Warehouse or Revolving Lines of Credit*

Traditionally, many Residential Mortgage Bankers have relied on "warehouse" or revolving lines of credit, in which a bank or other financing institution (the "Warehouse Lender") offers the Residential Mortgage Banker a revolving line of credit and takes a security interest in any residential mortgage loans originated using funds drawn from the line. The revolving nature of the loan means that the Residential Mortgage Banker—as a commercial borrower—can borrow, repay and then reborrow funds to make residential mortgage loans to consumers as long as the aggregate outstanding indebtedness does not exceed an established amount. This means that the Warehouse Lender advances funds under the line—sometimes referred to as draws to the Residential Mortgage Banker. The Residential Mortgage Banker uses the advances or draws either to fund residential mortgage loans made to consumers or to replace the source of funds used to make mortgage loans. Each advance is secured by the grant of a security interest in the individual mortgage loan directly or indirectly financed with such advance, and the Warehouse Lender or its designated agent takes possession of the loan documents to perfect its security interest in the pledged mortgage loan.

As a condition to making an advance to fund an eligible mortgage loan, the Warehouse Lender requires the Residential Mortgage Banker (i.e., the commercial borrower) to enter into a "take-out" commitment with an eligible third party investor to purchase the eligible loan and to pledge that take-out commitment to the Warehouse Lender as additional security for the commercial loan. When the mortgage loan is ready for sale by the Residential Mortgage Banker to the take-out investor (the "Purchaser" or the "Take-out Investor"), at the direction of the Residential Mortgage Banker, the Warehouse Lender delivers the loan documents of the pledged loan to the Take-out Investor or its designated document custodian. This delivery typically is made against a trust receipt or bailee letter, pursuant to which the Warehouse Lender states that it is delivering the loan documents in trust and that it does not release its security interest until purchase proceeds are paid directly to it by the Take-out Investor for the account of the selling Residential Mortgage Banker. The Warehouse Lender applies these purchase proceeds to the outstanding indebtedness of the Residential Mortgage Banker. The Residential Mortgage Banker, as a commercial borrower, then has these repaid funds available to draw against for future advances up to the committed amount of the warehouse line. The term "warehouse" is derived from the concept of the Warehouse Lender holding onto the pledged collateral until the Residential Mortgage Banker is ready to deliver the loans for sale to the Take-out Investor.

The revolving credit facility is styled as a financing in the documents. Both the Residential Mortgage Banker, as commercial borrower, and the Warehouse Lender, as the commercial lender, account for the revolving credit line as a financing on their respective books and records. Each individual advance or draw is repaid with accrued interest when the Residential Mortgage Banker sells the residential mortgage loan to an eligible Take-out Investor, such as to Fannie Mae, Freddie Mac or an approved private investor. As a result, a condition of the Warehouse Lender's funding of the mortgage loan is that the mortgage loan must be eligible for sale under one or more existing take-out loan purchase commitments with one or more eligible Take-out Investors (each, a "take-out commitment"), even if the mortgage loan is not specifically allocated to or pre-arranged under any particular take-out commitment with any particular Take-out Investor as of the time of financing under the warehouse line. The purpose of the take-out commitment is to ensure that the Residential Mortgage Banker is able to repay the commercial advance in accordance with its obligations under the warehouse agreement. Prior to such sale to the Take-out Investor, the Residential Mortgage Banker retains the pledged loan on its balance sheet.

*2. Repurchase Agreements*

One variation of a traditional warehouse revolving credit arrangement is a repurchase agreement. Rather than documenting the transaction between the Warehouse Lender and the Residential Mortgage Banker as a commercial line of credit, the transaction is the purchase of mortgage loans coupled an agreement to resell the loans at an agreed upon date for an agreed upon price. First, the Residential Mortgage Banker sells the closed loans to a Warehouse Lender, sometimes referred to as a Repo Buyer. Second, the Residential Mortgage Banker is obligated to repurchase the loan within a prescribed time frame in order to deliver the loan to a Take-out Investor, such as Fannie Mae or Freddie Mac, in the name of the Residential Mortgage Banker. While the transaction documents use sale and repurchase language to transfer the interest in the loan, both the Residential Mortgage Banker, as the initial seller and repurchaser, and the

Repo Buyer, as the initial purchaser and reseller, account for the sales as financings with the sold residential mortgage loans retained on the books and records of the Residential Mortgage Banker seller, just like a warehouse or revolving credit agreement. Underlying this characterization as a financing is the fact that the Residential Mortgage Banker is obligated to repurchase the loan at a pre-determined price, which price generally reflects an interest charge. The Warehouse Lender does not realize a gain or loss based on the price or value of the residential mortgage loan when it is sold to the Take-out Investor.

Repurchase agreements have been used by many Warehouse Lenders in part to avail themselves of the safe harbors from the application of the Bankruptcy Code's automatic stay. Section 362(a) of the Bankruptcy Code creates an "automatic stay" that prevents any creditor from immediately enforcing rights against a debtor or its property, which, among other concerns, impairs the ability of the Warehouse Lender to realize the market value of its collateral at the time of a default by a Residential Mortgage Banker under a warehouse line of credit.[8] Mortgage loans financed with repurchase agreements, on the other hand, are not subject to the automatic stay provisions of the Bankruptcy Code and often are used as an alternative to warehouse financing. These arrangements permit a Residential Mortgage Banker to sell a loan to the Repo Buyer, subject to an obligation to repurchase the loan within a brief period of time at a pre-determined price.[9] If the selling Residential Mortgage Banker files for bankruptcy, the Repo Buyer is free to liquidate the purchased mortgages and is not subject to the automatic stay under the Bankruptcy Code.

*3. Sale Agreements*

Repurchase agreements are only one of many short-term funding alternatives available to residential Warehouse Lenders. For a variety of legal, business and accounting reasons, many Warehouse Lenders use an alternate funding mechanism in which the Warehouse Lender acquires all right, title and interest in and to the residential mortgage loan in a transaction that is recognized as a sale for bankruptcy purposes.[10] This type of funding is attractive because Section 541(a)(1) of the Bankruptcy Code

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[8] 11 U.S.C.A. § 362(a).

[9] *Id.* §§ 101(47); 362(b)(7).

[10] The transfer may or may not be recognized as a sale on the books and records of the Residential Mortgage Banker for accounting purposes. For example, if the Residential Mortgage Banker and the Warehouse Lender are affiliates with consolidated financial statements, the transfer may not be reflected as a sale in the books and records of the transferor, but still arguably be considered a "sale" for bankruptcy purposes.

provides (with exceptions not relevant here) that the property of a bankruptcy estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case."[11] Property that has been effectively sold by the debtor prior to the date of the bankruptcy petition (subject to any fraudulent transfer or other avoidance issues) is no longer property of the bankruptcy estate.[12]

In a typical short-term, sale funding arrangement, the Warehouse Lender will purchase only current loans for which the Residential Mortgage Banker has in place a take-out commitment with a Take-out Investor to purchase eligible loans or, if a securitization is contemplated, to purchase the securities based on and backed by such loans. The price paid by the Warehouse Lender purchaser is pegged to this take-out commitment price. The Warehouse Lender subsequently delivers the loans into the commitment in the name of the Residential Mortgage Banker, and the Warehouse Lender relinquishes any ownership interest it has in the loans in exchange for the purchase price paid by the Take-out Investor under the pre-existing commitment. The selling Residential Mortgage Banker grants the Warehouse Lender a power-of-attorney to act as attorney-in-fact for the selling Residential Mortgage Banker to help facilitate the delivery of the mortgage loans to the Take-out Investor. Alternatively, for administrative purposes, the Warehouse Lender may transfer nominal title to the mortgage loans back to the selling Residential Mortgage Banker so that the selling Residential Mortgage Banker can make the required representations and warranties and transfer title to the Take-out Investor. Purchase proceeds in excess of a specified amount may be returned by the Take-out Investor to the selling Residential Mortgage Banker under a variety of arrangements. The Residential Mortgage Banker retains responsibility to service the loan during the period the Warehouse Lender owns the loan.

The proceeds from the purchase of a loan by the Warehouse Lender may or may not be used by the Residential Mortgage Banker directly to fund the residential mortgage loan. A Residential Mortgage Banker may use its own money to fund the residential mortgage loan to the consumer and then rely on funds to repay this internal funding source after closing. Regardless of whether mortgage loans are self-funded by the Residential Mortgage Banker or funded directly through short term financing transactions, the Warehouse Lender does not charge the consumer a fee or charge at closing for funds provided.

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[11] 11 U.S.C.A. § 541(a)(1).

[12] *See In re Contractors Equipment Supply Co.*, 861 F.2d 241, 245 n.8 (9th Cir. 1988) ("[had] the present case involved a true assignment, under basic contract law principles, the notification would have taken the account receivable out of the estate") (dictum).

As with repurchase agreements and revolving lines of credit, the Warehouse Lender ultimately does not realize a gain or loss to the extent that there is an increase or decrease in the value of the loan.

### C. Common Characteristics of Warehouse Lending

Regardless of the form of the arrangement, there are similarities in the process of extending warehouse funding. All Warehouse Lenders establish eligibility criteria for Residential Mortgage Bankers, residential mortgage loans and Take-out Investors. The eligibility criteria usually are based on, among other factors, the experience and financial strength, with minimum net worth and other financial requirements that the Residential Mortgage Banker is obligated to maintain throughout the term of the agreement. The eligibility of residential mortgage loans is based on the particular criteria that each Warehouse Lender utilizes for the type of residential mortgage loans it is willing to finance, such as conventional conforming, government insured or guaranteed, and non-conforming conventional. Warehouse Lenders may impose sublimits to limit their exposure to certain loan types or loan with certain features. The eligibility of Take-out Investors generally is based on the Warehouse Lender's assessment that the Take-out Investor has the capacity and willingness to purchase loans strictly in accordance with the terms of the take-out commitment and related mortgage loan purchase agreement. Since the goal of the Warehouse Lender is to be a short term holder of the mortgage loan that is repaid through purchase proceeds, the ability of the Take-out Investor to perform is of paramount importance to the Warehouse Lender, whether as a commercial lender or short term purchaser.

Beyond that, though, there are other similarities in the mechanics of the transaction without regard to the form of and accounting for the transaction. Whether the funding is structured as a loan, a repurchase agreement or a sale, the transaction includes all or nearly all of the following elements:

- The Warehouse Lender is not involved in the origination, processing, underwriting, closing or servicing of the loan, all of which remain with the Residential Mortgage Banker and its designees. The Warehouse Lender may require the completion of pre-funding quality control processes to ensure that the loan is eligible under the funding documents, such as evidence that the loan received an approval from a GSE automated underwriting tool or a due diligence provider, an anti-fraud check, or an appraisal or collateral review. The Warehouse Lender may even perform reviews itself prior to closing, especially for wet fundings,[13] but these quality control tools go not to whether the Residential Mortgage Banker may make the loan but to whether the loan meets the Warehouse Lender's program guidelines for financing.

- The Warehouse Lender does not interact with the consumer before, during or after the closing and financing of the residential mortgage loan, unless there is a default under the Residential Mortgage Banker's financing documents and the Warehouse Lender exercises its contract remedies to realize upon its collateral by acquiring absolute ownership of the loans. The Warehouse Lender does not charge the consumer a fee or charge at closing for funds provided under the repurchase or revolving credit agreement, regardless of whether its moneys directly fund the underlying mortgage loan.

- Whether the Warehouse Lender purports to own the loan under a sale funding agreement or merely to have a security interest in the loan, the interest is retained for only a short period of time, usually less than 90 days and more likely 30 to 60 days.[14]

- The acquisition of the interest in the loan by the Warehouse Lender is accomplished at a discount from or a "haircut" to the lesser of the original principal amount and the committed purchase price of the Take-out Investor. For example, the Warehouse Lender may fund the advance or purchase at 96% of the original principal amount, rather than paying a premium over the original principal amount, like a yield spread premium.

- These short-term advances or purchases only are made in anticipation of a take-out commitment arranged and executed by and between the Residential Mortgage Banker and a Take-out Investor, such as Fannie Mae, Freddie Mac, a whole loan purchaser, or a purchaser of Ginnie Mae securities. The take-out commitment is made pursuant to mortgage loan purchase and sale agreement between the Residential Mortgage Banker

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[13] Wet funding typically involves a Warehouse Lender, at the direction of the Residential Mortgage Banker, providing funds directly to the person who closed the loan and disburses the loan proceeds. The funds provided by the Warehouse Lender represent all or a significant portion of the funds to be distributed to the consumer.

[14] The actual amount of time varies and could in certain circumstances be less than 30 days or more than 90 days.

and the third party Take-out Investor. The Take-out Investor may for certain entities be an affiliate or separate correspondent group or division of the Warehouse Lender who bids on a pool of loans or who has agreed to purchase loans, but there is no commitment or requirement to sell a loan to the affiliate or correspondent division or group off of the financing or funding arrangement.[15]

- During the time the Warehouse Lender has a security interest or owns the loan, the Residential Mortgage Banker has a continuing obligation to ensure that the value of the pledged or purchased loan remains constant, by making margin payments. For example, if the fair market value of a $100,000 residential mortgage loan that the Warehouse Lender funded at $96,000 declines to $94,000, the Residential Mortgage Banker would be obligated to pay $2,000 to the Warehouse Lender during the time the Warehouse Lender or Repo Buyer held the loan. This obligation is based on the terms of the warehouse lending relationship and is not related to the loan origination process.

- The Warehouse Lender delivers the loans to the Take-out Investor in the name of the Residential Mortgage Banker in accordance with the terms of the take-out commitment and at the direction of the Residential Mortgage Banker. The Warehouse Lender relinquishes any ownership interest in the delivered loans as a condition to the purchase of the loans by the Take-out Investor. The Take-out Investor looks solely to the Residential Mortgage Banker for representations and warranties, indemnities and repurchase with respect to the sold loan under the mortgage loan purchase and sale agreement.

- The Warehouse Lender is the initial recipient of the purchase proceeds paid by the Take-out Investor for the account of the Residential Mortgage Banker and in turn it pays such proceeds in excess of a pre-determined amount to the Residential Mortgage Banker. The pre-determined amount essentially is an interest charge.

[15] The correspondent sales, even if to an affiliate or separate group or division of the Warehouse Lender, are handled by a separate agreement with the Residential Mortgage Banker, which provides for recourse by the Take-out Investor to the Residential Mortgage Banker. Additionally, the correspondent sales are not concurrent with the warehouse financing. The sale occurs days after the financing.

- If the Take-out Investor fails to purchase the residential mortgage loan from the Residential Mortgage Banker within the short time frame prescribed in the transaction documents (e.g., 90 days), the Residential Mortgage Banker is obligated either to repay the outstanding indebtedness to the Warehouse Lender with respect to the pledged mortgage loan or repurchase the loan from the Warehouse Lender.

- The Residential Mortgage Banker pays some form of interest to the Warehouse Lender. The Warehouse Lender does not realize a gain or loss to the extent that there is an increase or decrease value of the mortgage loan.

In other words, regardless of the form of and accounting for the transaction, the principal characteristic of a warehouse or other funding arrangement is that the Warehouse Lender or Repo Lender provides funding to the Residential Mortgage Banker and acquires a short term interest in the residential mortgage loan solely to facilitate the initial funding of the Residential Mortgage Banker's loan and the Residential Mortgage Banker's subsequent sale to the end Take-out Investor. The sale occurs pursuant to the terms of a "take out" commitment arranged by the Residential Mortgage Banker and for which the Residential Mortgage Banker remains responsible to the Take-out Investor. If the Take-out Investor fails to purchase the residential mortgage loan within the prescribed short term time frame, the Residential Mortgage Banker is obligated to reacquire the loan from the Warehouse Lender. If the Take-out Investor consummates its acquisition of the residential mortgage loan from the Residential Mortgage Banker, the Warehouse Lender relinquishes its interest in the loan upon receipt of the purchase proceeds for the account of the Residential Mortgage Banker and has no continuing obligations to the Take-out Investor, including without limitation with respect to the eligibility of the loan for sale to the Take-out Investor by the Residential Mortgage Banker pursuant to the take-out commitment and related sales agreement.

## II. TREATMENT UNDER RESPA

For the reasons described below, we request that any proposed rule making by HUD with respect to RESPA take into account two important elements. First, HUD should acknowledge that true commercial financings such as those provided by Warehouse Lenders described herein are not "settlement services" and thus are not subject to RESPA, regardless of whether an advance made by the Warehouse Lender are used by the Residential Mortgage Banker to make the mortgage loan to the consumer. Second, we request that HUD acknowledge that even if a Warehouse Lender's funds are used for an individual consumer loan and the Warehouse Lender acquires an interest in the loan after funding under a repurchase or sale agreement like that described above, the transaction should qualify as a secondary market transaction that is exempt from RESPA.

**A. Commercial Financings Are Not Settlement Services**

The Notice seeks to distinguish between “table funded” transactions and “secondary market” transactions. Revolving lines of credit are not styled as, accounted for or in any way treated as a sale, so such financings should not enter into the debate over what type of sale a pure financing contemplates. The fact that a financing transaction does not fall within the definition of either a table funding or a secondary market transaction does not make it a settlement service. Where a draw under a revolving line of credit is a “dry funding” that does not provide the source of funds with which the Residential Mortgage Banker, as the commercial borrower, makes a mortgage loan, there certainly is no rational argument that the commercial loan is a settlement service that is subject to RESPA; the funding clearly occurs after settlement of the mortgage loan. For that matter, the warehouse loan transaction also should be exempt under Section 7 of RESPA as a transaction primarily for business or commercial transactions.

Even where the draw under the commercial revolving credit line is the source of funds with which the Residential Mortgage Banker, as the commercial borrower, makes the mortgage loan, the Warehouse Lender has none of the characteristics of a residential lender and should not be subject to RESPA. The description above of the common attributes of financing transactions explains the limited role of the Warehouse Lender, a few of which we repeat here. First, the Warehouse Lender has no involvement in the origination of the loan and no interaction with the consumer before and after the closing of the residential mortgage loan. Second, the Warehouse Lender, in its capacity as a commercial lender, never acquires an outright ownership interest in the loan. Third, its security interest is limited in duration to the time it takes for the Residential Mortgage Banker, as the commercial borrower, to affect a sale of the closed loan to a Take-out Investor in the name of Residential Mortgage Banker and for which sale the creditor is solely responsible.[16] The fact that the Warehouse Lender may take title to the loan if there is a default under the commercial agreement with the Residential Mortgage Banker

[16] The residential mortgage loan promissory note and security instrument typically are assigned in blank to the Warehouse Lender or to a custodian acting on behalf of the Warehouse Lender. While a Warehouse Lender could perfect its security interest in the collateral by filing a UCC 1, taking possession of the collateral ensures that the Residential Mortgage Banker is not able to sell the mortgage loan more than one time and that the Warehouse Lender has immediate access to the mortgage loans in the event of a bankruptcy or default by the Residential Mortgage Banker. As such, taking possession of the collateral instead of filing a UCC 1 should not change the characterization of the transaction under RESPA.

or if the Residential Mortgage Banker is not able to sell the loan should not change the conclusion. These are true business-to-business transactions that do not directly touch the consumer and for which the consumer is not required to make any payment at the closing table. The commercial lender is not entering into the commercial transaction to acquire the funded loan for its own account. Any short term purchase only is made in anticipation of a take-out commitment. The assignment is to take advantage of favorable treatment under the Bankruptcy Code.

Repurchase agreements should be treated in the same way as commercial loans. While they may have sales and conveyance language in the transaction documents, both counterparties account for repurchase agreements as financings and the Residential Mortgage Banker as the seller retains the loans on its balance sheet. In this regard, note that Regulation Z under the Truth in Lending Act provides that a purchaser under a repurchase agreement would not be required to provide a notice to consumer when it acquires residential mortgage loan obligations pursuant to a repurchase agreement, provided that the Residential Mortgage Lender continues to recognize the loan as an asset on its own books and records.[17]

As with true revolving lines of credit, repurchase agreements that are used for "dry fundings" occur after the settlement of the underlying residential mortgage loans and clearly do not constitute settlement services that are subject to RESPA. Similarly, repurchase agreements that are used for "wet fundings" may provide the source of funds with which the Residential Mortgage Banker makes the loans but the Warehouse Lenders, the purchasers under such repurchase agreements, have none of the characteristics of a residential mortgage lender that is acquiring loans for its own account. Indeed, as noted above, such repurchase agreements are accounted for as financings and the purchaser never acquires an outright ownership interest in the loan notwithstanding the conveyance language. The fact that the financing is accomplished through a short term sale should not change the conclusion.

### B. Repurchase and Sale Agreements Are Exempt from RESPA and Qualify As Secondary Market Transactions

HUD should acknowledge that even a transaction recognized as a "sale" for bankruptcy and/or accounting purposes with the attributes noted above should not be accounted for as a sale or a table-funded transaction for RESPA purposes. Of course, as a threshold issue, such arrangements that are used for "dry fundings" clearly fall outside of the definition of settlement services and are exempt from RESPA. Agreements that

[17] 12 C.F.R. § 226.39(c)(2).

are used to replace a self–funding by the Residential Mortgage Banker by definition are not used until after the settlement of the underlying residential mortgage loan, do not provide a contemporaneous advance of funds by which the Residential Mortgage Banker funds the loan and thus do not include the first element of a “table funded” transaction.

In addition, we think such short term transactions that are used in “wet fundings” where the Warehouse Lender’s funds are the source of funds with which the Residential Mortgage Banker, as the commercial borrower, makes the mortgage loan, also should be treated as an exempt financing or an exempt secondary market transaction. The assignment of the mortgage loan to Warehouse Lender, as the purchaser, is not made to enable the Warehouse Lender in its capacity as a commercial lender to acquire the loan to hold for its own account for the long term. Rather, under the repurchase agreement, the Residential Mortgage Banker has a mandatory contractual obligation to repurchase the mortgage loan from the Warehouse Lender, usually within 90 days, and the Warehouse Lender must resell the loan to the Residential Mortgage Banker to enable the Residential Mortgage Banker to allocate the loan to a pre-existing take-out commitment and then sell the loan to an eligible Take-out Investor in the name of and for the account of the Residential Mortgage Banker. The business purpose of the assignment is a safety and soundness concern. The Warehouse Lender does not want to relinquish control of its funds unless it knows that it has an enforceable interest in the funded loan. Such a contemporaneous exchange of funds for an enforceable interest in the loan by itself does not justify recharacterization of Warehouse Lenders into Residential Mortgage Bankers.

The attributes of the sale transaction described above simply do not fit with the characterization of the purchaser as the functional equivalent of the originating residential mortgage lender. As with warehouse lines of credit and repurchase agreements, the Warehouse Lender is not involved in the origination of the loan. It does not exercise ownership rights beyond the short term period during which it holds the loan pending a sale by the Residential Mortgage Banker, which is the true residential lender to a separate third-party investor. The sale is made by the Residential Mortgage Banker to the Take-out Investor, and the purchase price is paid for the account of the Residential Mortgage Banker that is solely responsible for the loan level representations and warranties it makes to the take-out investor. If the Take-out Investor fails to perform within a prescribed short time frame, the Residential Mortgage Banker is obligated to buy back the loan from the Warehouse Lender. If the Take-out Investor performs and buys the loan, the Warehouse Lender recognizes that the sale is by the Residential Mortgage Banker and is pursuant to a separate agreement between the Take-out Investor and the Residential Mortgage Banker. Any potential gain or loss based on changes in value of the residential mortgage loan ultimately resides with the Residential Mortgage Banker. The Residential Mortgage Banker that originated the loan, interacted with the consumer- both before and after the sale- and sold the loan to the Take-out Investor is the real party in interest and the Warehouse Lender should be considered outside the scope of RESPA.

In each of the financing mechanisms described above, the real interest of the Warehouse Lender is not to act as a Residential Mortgage Banker and interact with consumers or to ultimately own the loan originated. Instead, the Warehouse Lender is ensuring that it has a valid security interest in the collateral for the commercial loan it makes to the Residential Mortgage Banker. There is no reason to recharacterize the initial payee under the mortgage note as a mortgage broker and the Warehouse Lender as a short term purchaser as the lender under RESPA; the real party in interest is the Residential Mortgage Banker.

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We greatly appreciate your consideration of the views set forth in this letter, and we would be pleased to have the opportunity to discuss these matters further with HUD. If you have any comments or questions, please feel free to contact Richard Dorfman at (212) 313-1359 or rdorfman@sifma.org, or Chris Killian at (212) 313-1126 or ckillian@sifma.org.

Sincerely,

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