

**This Notice is pending publication in the Federal Register.
This notice, when published in the Federal Register, will establish the Public Comment Due Date.**

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[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**

AGENCY: Office of General Counsel, HUD.

ACTION: Notice.

SUMMARY: HUD is considering issuing guidance under RESPA to address possible 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 in 1992 and 1994. In order to assist HUD in determining whether such guidance is needed and to formulate such guidance, HUD is seeking information on how funding mechanisms have evolved in recent years, and especially on how warehouse lending currently operates within residential real estate mortgage transactions.

HUD welcomes input from warehouse lenders, retail lenders, mortgage bankers, wholesale lenders, correspondent lenders, mortgage brokers, and others in the mortgage lending industry, as well as from federal, state, and local consumer protection and enforcement agencies; consumer groups; and other members of the public. Based on information received in response to this solicitation, HUD will decide what, if any, additional guidance is needed on the scope of RESPA as applied to current mortgage funding practices.

DATES: Comment Due Date: **[Insert date that is 30 days after date of publication in the FEDERAL REGISTER.]**

ADDRESSES: Interested persons are invited to submit comments regarding this notice to the Regulations Division, Office of General Counsel, 451 7th Street, SW, Room 10276, Department

of Housing and Urban Development, Washington, DC 20410-0500. There are two methods for submitting public comments. All submissions must refer to the above docket number and title.

1. Submission of Comments by Mail. Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW, Room 10276, Washington, DC 20410-0500.

2. Electronic Submission of Comments. Interested persons may submit comments electronically through the Federal eRulemaking Portal at www.regulations.gov. HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the www.regulations.gov website can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

Note: To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the rule.

No Facsimile Comments. Facsimile (FAX) comments are not acceptable.

Public Inspection of Public Comments. All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at 202-708-3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number through TTY by calling

the toll-free Federal Information Relay Service at 800-877-8339. Copies of all comments submitted are available for inspection and downloading at www.regulations.gov

FOR FURTHER INFORMATION CONTACT: For legal questions, contact Paul S. Ceja, Assistant General Counsel for RESPA/SAFE, telephone number 202-708-3137; or Peter S. Race, Assistant General Counsel for Program Compliance, telephone number 202-708-2350; Department of Housing and Urban Development, 451 7th Street, SW, Room 9262, Washington, DC 20410. For other questions, contact Barton Shapiro, Director, or Mary Jo Sullivan, Deputy Director, Office of RESPA and Interstate Land Sales, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 9158, Washington, DC 20410; telephone number 202-708-0502. These telephone numbers are not toll-free. Persons with hearing or speech impairments may access these numbers via TTY by calling the toll-free Federal Information Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:

I. Background

Due to the length of time since the issuance of regulations on the treatment and coverage of warehouse lending under RESPA (12 U.S.C. 2601-2617), HUD is reviewing the need to provide additional guidance in this area pursuant to its authority under section 19 of RESPA (12 U.S.C. 2617).

The requirements and prohibitions under RESPA apply to credit transactions that involve federally related mortgage loans. These mortgage loans include most purchase loans, assumptions, refinances, property improvement loans, and home equity lines of credit that are secured by liens placed on one- to four-family residential properties. The purposes of RESPA

are, generally, to help consumers become better shoppers for settlement services and to eliminate kickbacks and referral fees that unnecessarily increase the costs of certain settlement services.

To achieve its purposes, RESPA requires, in part, that borrowers receive disclosures at various times in the transaction. These disclosures explain the borrower's loan, detail the costs associated with settlement, summarize servicing and escrow account practices, and describe affiliated business relationships among settlement service providers. In January 2010, major revisions to the Good Faith Estimate ("GFE") and uniform settlement statement ("HUD-1/1A") disclosure forms mandated in HUD's RESPA regulations (24 CFR part 3500) took effect.

RESPA also prohibits certain practices that increase the cost of settlement services. For example, section 8 of RESPA prohibits a person from giving or accepting anything of value for referrals of business incident to or part of a settlement service provided in a covered transaction. RESPA also prohibits a person from giving or accepting any part of a charge other than for services actually performed.

II. Scope of RESPA Coverage

In order to effectively and efficiently accomplish the consumer protection purposes of RESPA, it is important for HUD to ensure that RESPA's requirements and prohibitions are applied appropriately in all covered home mortgage transactions. A consumer needs reliable information about the terms of his or her mortgage transaction, which can include understanding any competing interests of other persons who are involved in the transaction. While settlement service providers are expected to profit from the services they provide with regard to the transaction, Congress was clear in its intent in passing RESPA that consumers be "provided with greater and more timely information on the nature and costs of the settlement process and...protected from unnecessarily high settlement charges." 12 U.S.C. 2601(a).

HUD's commitment to protect homebuyers and to ensure that consumers are provided with greater and timelier information on the nature and costs of the settlement process was clearly demonstrated in the rulemaking that led to the recent revisions to the GFE and HUD-1/1A disclosures and related requirements. However, HUD also seeks to avoid economic inefficiencies and burdens on other participants in the mortgage process that could harm consumers through increased settlement costs, as well as to recognize technological and business arrangement innovations that could reduce settlement costs for consumers.

For example, HUD has been reviewing industry practices in the funding of residential mortgage loans, and the evolution of those practices since HUD issued its major revision of the basic RESPA regulations in 1992 (57 FR 49600, November 2, 1992) ("1992 rule"). In the 1992 rule, HUD codified a regulatory exemption from the RESPA requirements for transactions in the secondary market.¹ Subsequently, in a 1993 proposed rule² and 1994 final rule,³ HUD discussed and revised the secondary market exemption, and added a new definition of "table funding".⁴ Since 1992, HUD's regulations have provided some type of exemption from RESPA for bona fide transfers of the mortgage loan obligation in the secondary market. In the 1992 rule, HUD stated that "[i]n determining what constitutes a bona fide transfer, HUD would consider the real source of the funding and the real interest of the settlement lender." (See 57 FR at 49609; "settlement lender" later changed to "funding lender" as clarification in February 10, 1994 final

¹ The 1992 rule noted an exemption for "bona fide secondary market transactions" (57 FR at 49605); codified the exemption in 24 CFR § 3500.5(b)(3) (57 FR at 49609); and added Appendix B, Illustration 5, as an example of a transaction in the secondary market (57 FR at 49618).

² 58 FR 28478 (May 13, 1993).

³ 59 FR 6506 (February 10, 1994).

⁴ See, 24 CFR 3500.5(b)(7) ("Secondary market transactions"); and 3500.2 (definition of "Table funding").

rule. See 59 FR at 6509). In the 1992 rule, HUD also referenced "table funding" in clarifying how the exemption would apply to mortgage broker transactions.

HUD has continued to review mortgage loan funding practices and is considering issuing guidance to address changes in the operation of warehouse lending since HUD's RESPA regulations relevant to this area were promulgated and revised over 15 years ago. To assist HUD in determining both whether updated guidance would be helpful and the scope of such guidance, HUD is seeking information on the current state of warehouse lending and how it currently operates within residential real estate mortgage transactions. HUD particularly seeks input from the mortgage lending industry, including specifically warehouse lenders, retail lenders, mortgage bankers, wholesale lenders, correspondent lenders, and mortgage brokers, and from federal, state, and local consumer protection and enforcement agencies; consumer groups; and other members of the public.

III. Suggested Topics for Comment

HUD encourages commenters to provide any relevant information describing and discussing the structures and operation of warehouse lending and other mechanisms currently used to fund mortgage loans. HUD suggests the following specific questions for which answers could provide HUD with helpful information as it assesses the need for and extent of any further guidance in this area:

(1) What are the general characteristics of warehouse lending in the context of mortgage loan financing? Specifically:

(a) How does a warehouse lender provide funding to loan originators (e.g., through a line of credit; by funding individual loans; any other method)? If funding is provided through a line of credit, what characteristics indicate a bona fide warehouse line of credit?

With regard to each type of funding provided, what criteria does the warehouse lender use to determine that it will provide funding to a loan originator?

(b) What mechanisms are used by the warehouse lender to assure repayment of the funding provided to the loan originator? For example, what security is taken or other evidence of the debt obligation is accepted, and what kinds of agreements are made concerning liability for repayment?

(c) Does ownership of a mortgage loan that is originated by a loan originator who is funded by the warehouse lender ever transfer to the warehouse lender? If ownership does transfer, how does the transfer occur (e.g., through purchase or assignment), and for typically what period of time? Additionally, how is the transfer of ownership accomplished (e.g., does physical possession change)?

(d) If ownership of loans is transferred to the warehouse lender, are the loan originators ever obligated to repurchase the loan under a repurchase agreement? If so, how often is a repurchase agreement used in such transactions?

Is the obligation to repurchase a loan subject to such an agreement absolute or conditional? If conditional, please describe the typical conditions that apply.

What repurchase agreement terms are necessary to ensure that the arrangement between the warehouse lender and loan originator is truly only a financing mechanism for the loan originator's business? Specifically, what agreement terms are necessary to conclude that the arrangement is a mechanism for financing a loan originator, as distinguished from a method of funding an individual loan (e.g., the lack of conditions on the loan originator's obligation to repurchase the loan)? Are there factors beyond the repurchase agreement between the parties

that HUD should consider in determining the real interests of the parties with regard to each loan transaction? If so, please identify any such factors.

(e) To what extent is the warehouse lender involved in the loan-level credit approval decision with respect to each mortgage loan application?

What level of scrutiny do warehouse lenders engage in with regard to individual loan files on originated loans?

When does this review take place in the transaction (e.g., before a funding commitment; after a funding commitment but before settlement)?

Does the warehouse lender establish underwriting criteria that must be accepted by the loan originator? Do the criteria vary based on fluctuations in the market? Do the criteria change at the discretion of the warehouse lender?

Do warehouse lenders approve the funding of individual loans before settlement?

Does the size or creditworthiness of the loan originator influence the level of scrutiny of individual loans?

(f) How has warehouse lending evolved since HUD issued its regulations on table funding and secondary market transactions in 1994?

(2) What particular characteristics distinguish warehouse lending from retail lending? What is the role of warehouse lending within the primary mortgage market versus the secondary market?

(3) What distinguishes the funding of a mortgage loan from a sale of the mortgage loan in the secondary market? For example, what characteristics indicate a bona fide transfer of the loan obligation, such that the transaction would be a secondary market transaction that is not covered by HUD's RESPA regulations?

What are the basic mechanics for the sale of a loan by a warehouse lender into the secondary market? Specifically, what are the mechanics for identifying, locating, and transferring mortgages to secondary market participants, and what are the respective roles of each of the parties involved in these activities?

Do warehouse lenders sell directly to the secondary market? Do warehouse lenders utilize loan originators in the sale of loans into the secondary market? If so, how?

Do warehouse lenders participate in purchasing loans in the secondary market? If so, do warehouse lenders purchase loans from loan originators with whom they have a warehouse lending relationship? Do the criteria for purchase from a loan originator within the warehouse lending relationship differ from the criteria for purchase from a loan originator without this relationship?

Is there a need to clarify the secondary market exemption as set forth in 24 CFR § 3500.5(b)(7)? If so, how should the exemption be clarified?

(4) What role does a warehouse lender play in a table funded transaction?

Does a warehouse lender fund loans at settlement contemporaneously with assignment of the loans to the warehouse lender by the loan originator, or contemporaneously with receiving some other evidence of a debt obligation from the loan originator?

(5) What, if any, characteristics distinguish a table funded transaction completed by a mortgage broker from a loan made by a mortgage banker who has an advance commitment to sell the loan after settlement?

(6) Does a warehouse lender fund mortgage loans within the meaning of "settlement service" as that term is defined in section 2 of RESPA and 24 CFR 3500.2?

(7) What factors determine who is identified as the payee on the mortgage loan note?

(8) Have concerns about protection under bankruptcy laws influenced changes in how warehouse lenders operate in relation to loan originators? If so, what concerns, and what changes have resulted?

(9) What do warehouse lenders regard as being their obligations for providing the disclosures required under RESPA? For example, in a mortgage loan transaction that involves a warehouse lender, what is the warehouse lender's obligation with regard to providing a good faith estimate disclosure to the borrower?

(10) Do consumers or others have concerns with regard to mortgage industry participants' current interpretation of HUD's secondary market exemption, including the impact that such interpretations may have on consumers regarding coverage of RESPA disclosures and Section 8 protections against kickbacks and referral fees?

Authority: 12 U.S.C. 2601-2617; 42 U.S.C. 3535(d).

Dated: November 16, 2010

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Helen R. Kanovsky, General Counsel