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To: Clients and Friends

From: David F. Dulock

Subject: Warehouse Lending RESPA Guidance – What is HUD Up to Now?

In the November 24, 2010, issue of the *Federal Register* (75 F.R. 71724), the Department of Housing and Urban Development (HUD) published Notice that it is considering issuing RESPA guidance regarding warehouse lending and other financing mechanisms used to fund federally related mortgage loans. HUD states that it is seeking information on the current state of warehouse lending and how that method of funding currently operates within residential real estate mortgage transactions and wants input from the mortgage lending industry and others. To accomplish this, the Notice poses ten questions, some of which contain follow-up questions. Those persons interesting in responding to the Notice, however, are not limited to answering these questions and may provide any relevant information regarding warehouse lending and other mechanisms currently used to fund federally related mortgage loans.

If you wish to respond to HUD's Notice, you must do so by mail or electronically in the manner set out in page 71724 of the Notice (facsimile comments will not be accepted). The due date for comments is December 27, 2010. The Notice may be accessed at: http://edocket.access.gpo.gov/2010/pdf/2010-29663.pdf.

For your convenience, republished below are the ten questions posed by HUD:

(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?

For those clients who consider warehousing lending an important part of their business model, we advise you to make your views known to HUD by submitting comments regarding the Notice by no later than December 27, 2010, in the manner set out in page 71724 of the Notice.