August 1, 2011

The Honorable Ben S. Bernanke
Chairman
Board of Governors of
the Federal Reserve System
20th & Constitution Ave., N.W.
Washington, D.C. 20219

Mr. John G. Walsh
Acting Comptroller
Office of the Comptroller of the Currency
250 E Street, S.W.
Washington, D.C. 20551

The Honorable Shaun L. S. Donovan
Secretary
Department of Housing & Urban Development
451 7th Street, S.W.
Washington, DC 20410

The Honorable Mary L. Schapiro
Chair
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

The Honorable Martin J. Gruenberg
Acting Chairman
Federal Deposit Insurance Corp.
550 17th Street, N.W.
Washington, D.C. 20429

Mr. Edward J. DeMarco
Acting Director
Federal Housing Finance Agency
1700 G Street, N.W.
Washington, D.C. 20552

Re: Credit Risk Retention Proposed Rule
Transmitted electronically to:

- OCC: regs.comments@occ.treas.gov (Docket No. OCC-2011-0002)
- Federal Reserve: regs.comments@federalreserve.gov (Docket No. R-1411)
- FDIC: comments@FDIC.gov (RIN 3064-AD74)
- SEC: Rule-comments@sec.gov (File Number S7-14-11)
- FHFA: RegComments@FHFA.gov (RIN 2590-AA43)
- HUD: www.regulations.gov (Docket No. FR-5504-P-01)

Dear Sirs/Madams:

On behalf of the Real Estate Services Providers Council, Inc. (RESPRO®) I am submitting comments in response to the proposed rule[1] to implement the Risk Retention standards set forth in Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-

[1] Credit Risk Retention, 76 Fed. Reg. 24090 (proposed April 29, 2011), *available at* http://edocket.access.gpo.gov/2011/pdf/2011-8364.pdf.

Frank), with an exemption for "Qualified Residential Mortgages" (QRMs) meeting the standards to be set forth in the final Risk Retention regulation.[2]

I. About RESPRO®

RESPRO® is a national non-profit trade association of over 150 providers from all segments of the residential home buying and financing industry, including real estate brokerage firms, homebuilders, mortgage lenders, financial institutions, and title agents/underwriters.

The common bond of RESPRO® members is that they offer a diversified menu of services (commonly referred to as "one-stop shopping") for home buyers and home owners through wholly-owned subsidiaries or through joint ventures with other providers, both of which are designated under the Real Estate Settlement Procedures Act (RESPA) as "affiliated business arrangements."[3] Many RESPRO® members are residential real estate brokerage firms or homebuilders that offer affiliated mortgage and title services to home buyers. RESPRO®'s membership also consists of mortgage and title companies that enable real estate brokerage firms and homebuilders to offer affiliated services through joint ventures with these companies.

II. Summary of RESPRO®'s Comments

At the outset, RESPRO® wants to express our members' concerns over the over-restrictiveness of the proposed rule's QRM definition. The purpose of the QRM exemption was to allow for the continued origination of well-underwritten and documented mortgage loans. However, RESPRO® members across industry lines believe that the federal regulators' proposed definition of QRM—particularly with respect to its

---

[2] *See* Dodd Frank, Pub. L. 111–203, § 941, 124 Stat. 1376, 1894 (2010).

[3] Recognizing the potential benefits that affiliated businesses can offer consumers, Congress amended RESPA in 1983 to exempt from the 1974 law's referral fee prohibition (12 U.S.C. § 2607(a)), the return of an ownership interest (e.g., a dividend based on stock ownership) in an ABA as long as the following conditions are met:

- The person who refers business to an ABA discloses at or before the time of the referral the existence of the arrangement to the person being referred;
- Such person is not required to use any particular provider of settlement services; and
- The only thing of value that is received from the arrangement, other than certain other payments permitted under RESPA section 8(c), is a return on the ownership interest or franchise relationship.

See 12 U.S.C. § 2607(c)(4) (ABA exemption). In 1996, the United States Department of Housing and Urban Development (HUD) issued a RESPA Policy Statement setting forth certain guidelines on affiliated businesses. HUD stated that the ABA exemption was not intended to apply to "sham" arrangements that are not "bona fide" providers of settlement services, and attempted to provide guidance to affiliated businesses as to what factors HUD considers when making this determination. *See* HUD Statement of Policy 1996-2, Regarding Sham Controlled Business Arrangements, 61 Fed. Reg. 29,258 (June 7, 1996) ("HUD Sham Joint Venture Guidelines").

down-payment, loan-to-value (LTV), and debt-to-income (DTI) requirements—would significantly limit access to credit for well-qualified buyers and have a chilling effect on mortgage credit and the nation's fragile economy. RESPRO® supports the concepts embodied in the Industry-Consumer Coalition White Paper submitted to federal regulators on July 11, 2011,[4] which points to the negative consequences of a narrow QRM definition on mortgage credit and on home buyers, particularly low-income to lower-middle income home buyers.

As stated above, RESPRO® represents companies across industry lines that operate legally-compliant affiliated businesses in the home buying and financing marketplace. Accordingly, the remainder of our comments will specifically focus on how the 3% "points and fees" threshold that federal regulators propose to adopt as part of the QRM definition in their Risk Retention regulation—which incorporates the 3% "points and fees" threshold that the Federal Reserve Board (Board) recently proposed to adopt as part of its "Qualified Mortgage" (QM) definition under the Dodd-Frank Ability to Repay standards (76 Fed. Reg. 27,390 (May 11, 2011)—discriminates against the affiliated business model to the detriment of consumers and the mortgage marketplace.

Dodd-Frank provided federal regulators flexibility to exempt certain fees from the 3% points and fees threshold in both regulations. RESPRO® submitted comments to the Federal Reserve Board that urge it to exempt affiliated title and title-related fees from the 3% threshold in the QM definition under the authority given it under Title XIV of Dodd-Frank. Our comments today focus on why an identical exemption in the QRM definition in the final Risk Retention regulation is consistent with the authority given to federal regulators under Title X of Dodd-Frank.

III. Affiliated Businesses In the Home Buying Industry

The affiliated business model is not new in the home buying and financing industry. Over the last several decades, real estate brokerage firms, homebuilders, and mortgage lenders increasingly have recognized the value of using affiliated mortgage, title, and other settlement service companies to assure that each transaction is completed as quickly and efficiently as possible.

Mortgage lenders, including realty-owned and builder-owned mortgage lenders, are able to conduct transactions with greater speed and efficiency with affiliated title and settlement service businesses because they often have integrated platforms that allow the affiliated companies to more efficiently communicate with each other. The buyers' names, addresses, telephone numbers, the name and address of the lender, the property address, the sellers' names, and the date and place of the closing are types of information that all settlement service providers require to render their services. Having the information available on a common platform reduces the time to complete the transaction

[4] Coalition for Sensible Housing Policy White Paper, "Proposed Qualified Residential Mortgage Definition Harms Creditworthy Borrowers While Frustrating Housing Recovery" (July 11, 2011), *available at* http://www..org/mortgage-lending/policy-legislation/regulators/Coalition-QRM-White-Paper-1.pdf.

and reduces the likelihood that errors will be made by separate entries on different computer systems.

Consumer surveys have consistently shown that consumers who use one-stop shopping programs that affiliated businesses offer appreciate these benefits. In a December 2010 Harris Interactive survey, home buyers said that using affiliates saves them money (78%), makes the home buying process more manageable and efficient (75%), prevent things from "falling through the cracks" (73%), and is more convenient (73%) than using separate services.[5] These results are consistent with a 2002 survey of 2,052 recent and potential home buyers, which found that 64% of home buyers who had recently used one-stop shopping programs had a better overall experience with their home purchase transaction.[6]

The presence of affiliated businesses in the mortgage marketplace is not insubstantial. The latest comprehensive study of the presence of both realty-based and homebuilder-based affiliated businesses of which RESPRO® is aware was conducted in 2004 by Weston Edwards and Associates. Edwards found that in 2004: (1) 88% of the nation's largest 350 real estate brokerage firms offered affiliated mortgage services; (2) 69% of the nation's largest 50 real estate brokerage firms and 55% of that nation's top 51 to 350 real estate brokerage firms offered title insurance; (3) all of the nation's top ten homebuilders and 76% of the top 11 to 150 homebuilders offered affiliated mortgage services; and (4) all of the nation's top ten homebuilders and 83% of the top 11 to 150 homebuilders offered affiliated title services.[7]

Furthermore, according to the independent real estate research firm REAL *Trends*, Inc., the nation's 500 largest residential real estate brokerage firms alone closed 150,962 mortgage loans and conducted 358,172 title closings through affiliated title companies in 2010.

IV. The Potential Impact of Dodd-Frank's Risk Retention Standard on Affiliated Businesses

Dodd-Frank instructed federal regulators to define the term QRM under their final Risk Retention regulation in a manner that is no broader than the definition of a QM under the final regulation implementing Dodd-Frank's Ability to Repay standards under Title XIV.[8] Title XIV of Dodd Frank provides that a mortgage loan would *not* be a QM for purposes of the Ability to Repay standards if the total "points and fees" paid by the consumer in the transaction exceed 3% of the loan amount. In determining what "points and fees" are included in the 3% threshold, Dodd-Frank adopted (with slight variations) the "points and

[5] Harris Interactive, One-Stop Shopping Consumer Preferences (Feb. 2008), performed by Harris Interactive and commissioned by the National Association of Realtors (NAR).

[6] Murray Consulting, Consumer Perspectives on Realty-Based One-Stop Shopping (2002).

[7] Weston Edwards & Associates, Significant Changes Found and Expected in the Way Houses are Bought and Sold (2004).

[8] Dodd Frank, Pub. L. 111–203, § 941, 124 Stat. 1376, 1895 (2010).

fees" definition under the Home Owners and Equity Protection Act (HOEPA), which counts fees retained by a mortgage lender's *affiliated* company towards the 3% threshold, but not fees paid to a third party.[9]

If the "points and fees" components of the QM definition under Title XIV and the QRM definition under Title X are not modified in both final rules, a loan in which a mortgage lender's affiliated title company is used would more likely exceed the 3% threshold, in which case the loan could not be either a QM or a QRM—even if the mortgage lender complied with all other requirements to be qualified as a QM or a QRM.[10]

Under Title XIV, the Board, FHA, VA, and the Department of Agriculture are given the authority to "revise, add to, or subtract from the criteria" that define a QM under the Ability to Repay standards for loans under their jurisdiction by regulation "upon a finding that such regulations are necessary or proper to ensure that responsible, affordable mortgage credit remains available to consumers . . .." [11] The Board published a proposed regulation to implement the Ability to Repay standards on May 11, 2011.[12] It acknowledged the concern of affiliated mortgage lenders over the discriminatory impact of the "points and fees" test under the Ability to Repay standards, but did not propose an exemption at that time. Nevertheless, it specifically invited comments on whether it should exclude certain affiliated fees from the 3% threshold in its final regulation.[13]

RESPRO® submitted comments on the Board's proposed Ability to Repay regulation on July 22, 2011 (*see* RESPRO® comments). We pointed out that if the regulation takes effect as proposed, companies with affiliated mortgage and title operations will withdraw from either the mortgage or title markets in certain marketplaces throughout the country, particularly low-income and low-middle income marketplaces, which will reduce competition in these marketplaces and thereby reduce the affordability of mortgage credit. To prevent this result, we urged the Board to create a narrow exemption for affiliated title fees from the 3% points and fees threshold in the QM definition that will not compromise the goals of Dodd-Frank and HOEPA.

V. Affiliated Loans Have Superior Delinquency Rates That Justify Equal Treatment Under the Dodd-Frank Risk Retention Standards

Dodd-Frank also provided federal regulators specific parameters to consider as it establishes the definition of a QRM under Dodd-Frank's Risk Retention standards. Specifically, it gave authority to the federal banking agencies, the Commission, the Secretary of Housing and Urban Development, and the Director of the Federal Housing

---

[9] *See id.* (relying on the HOEPA definition of "points and fees," section 103(aa)(4) of the Truth in Lending Act (TILA) (15 U.S.C. § 1602(aa)(4)), as amended by Dodd Frank, Pub. L. 111–203, § 1431(c), 124 Stat. 1376, 2159 (2010)).

[11] Dodd Frank, Pub. L. 111–203, § 1412, 124 Stat. 1376, 2148 (2010) (emphasis added).

[12] 76 Fed. Reg. 27,390.

[13] 76 Fed. Reg. at 27,404 (emphasis added).

Finance Agency to take into consideration "underwriting and product features that historical loan performance data indicate result in a lower risk of default." [14]

RESPRO® believes that loans originated by mortgage lenders with affiliated title companies have underwriting and product features that lead to a lower risk of default in historical loan performance data, which justifies the same narrow exemption for affiliated title fees from the 3% points and fees threshold in the QRM definition that RESPRO® urged the Board to create in its QM definition under the Ability to Repay standards.

As pointed out above, the majority of RESPRO® members are residential real estate brokerage firms or homebuilders that offer affiliated mortgage, title, and/or other settlement services to home buyers, or they are mortgage and title, and other settlement that enable real estate brokerage firms and homebuilders to offer affiliated services through joint ventures with these companies. The vast majority of loans originated by these affiliated businesses are purchase money mortgages, which have lower default rates than mortgages on non-owner occupied properties as well as those with simultaneous second liens.

RESPRO® is unaware of any national data that compares delinquency rates of loans in which affiliated versus unaffiliated title services are used, but it is possible to assess delinquency rates of loans originated and sold to investors by affiliated mortgage companies of real estate brokerage firms that also have affiliated title companies offering services that its home buyers use in the majority of their affiliated mortgage companies' loans. Therefore, RESPRO® analyzed investor performance records [15] of mortgage loans originated and sold to investors by wholly-owned mortgage companies of two of the nation's largest independent real estate brokerage firms -- Prudential Fox & Roach Realtors of Devon, Pennsylvania[16] and Howard Hanna Real Estate Services of Pittsburgh, Pennsylvania[17] -- that together originated 15,119 loans in 2010, the majority of which the borrower also used the affiliated title company.

Prudential Fox and Roach Realtors originated 8,800 mortgage loans in 2010 through its wholly-owned mortgage company, Trident Mortgage, for approximately $2.2 billion. It issued 10,000 title policies through its wholly-owned title company, Trident Land Transfer, in 2010.

---

[14] Dodd Frank, Pub. L. 111–203, § 941, 124 Stat. 1376, 1894 (2010) (emphasis added).

[15] The investor performance data reflected loans originated and sold by these real estate brokerage firms to Wells Fargo, Chase, and GMAC over the two-year period before June 30, 2011.

[16] Prudential Fox & Roach Realtors was the 7th largest independent residential real estate brokerage firm in the nation in 2010, with 19,787 closed real estate transaction sides in Pennsylvania, New Jersey, and Delaware. "The 500 Largest Brokers in the U.S.", Real *Trends*, Inc. (2011).

[17] Howard Hanna Real Estate Services was the 4th largest independent residential real estate brokerage firm in the nation in 2010, with 30,493 closed real estate transaction sides in Pennsylvania and Ohio. "The 500 Largest Brokers in the U.S.", Real *Trends*, Inc. (2011).

Of the 6,996 affiliated mortgage loans (conventional, FHA and VA) that Trident Mortgage originated and sold to Wells Fargo over the last 24 months, 0.76% were 30-59 days delinquent, 0.14% were 60-89 days delinquent, and l.16% were in foreclosure. Of the 3,103 mortgage loans (conventional, FHA and VA) that Trident Mortgage sold and originated to Chase over the last 24 months, 0.84% were 30+ days delinquent and 0.10% were 90+ days delinquent. Of the 2,653 conventional loans that Trident Mortgage originated sold to GMAC over the last 24 months, 1.81% were 30-59 days delinquent, 0.45% were 60-89 days delinquent, 0.34% were 90 days plus delinquent and 1.06% in foreclosure. Of the 899 FHA loans that Trident Mortgage sold to GMAC over the last 24 months, 3.34% were 30-59 days delinquent; 0.32% were 60-89 days delinquent, 0.13% were over 90 days delinquent and 0.06% were in foreclosure.

Howard Hanna Real Estate Services originated 6,319 mortgage loans for approximately $1 billion through its wholly-owned mortgage company, Howard Hanna Mortgage Services. It issued 7,015 title policies through its wholly-owned title companies, Barristers Land Abstract and Barristers of Ohio, in 2010.

Of the 1,560 mortgage loans (combined conventional, FHA and VA) that Howard Hanna Mortgage Services originated and sold to Wells Fargo in the past 24 months, 1.09% were 30-59 days delinquent, 0.16% were over 60-89 days delinquent, 0.14% were over 90 days delinquent, and 0.16% were in foreclosure. Of the 3,417 mortgage loans (combined conventional, FHA and VA) that Howard Hanna Mortgage Services sold to Chase in the past 24 months (ongoing), 1.57% were 30-89 days delinquent and 0.48% were over 90 days delinquent. Of the 865 conventional loans that Howard Hanna Mortgage Services originated and sold to GMAC over the last 24 months, 0.92% were 30-59 days delinquent, 0.35% were 60-89 days delinquent, 0.12% were over 90 days delinquent, and 1.16% were in foreclosure.

This delinquency record of loans originated by these real estate brokerage firms' affiliated mortgage companies clearly is superior to the national delinquency record of loans originated by all mortgage companies during similar time periods. According to TransUnion, the average mortgage delinquency rate for the first quarter of 2011 was 6.19% nationally, and the mortgage delinquency rates in the states in which these real estate brokerage firms originate mortgage loans was 4.9% in Ohio, 4.43% in Pennsylvania, 6.47% in Delaware, and 7.58% in New Jersey.[18]

Since the vast majority of loans originated through theses real estate brokerage firms' affiliated mortgage companies utilized title services of their affiliated title companies, there is no evidence of a lower risk of default associated with loans in which an affiliated title company is used. In fact, RESPRO® believes that an analysis of delinquency data of

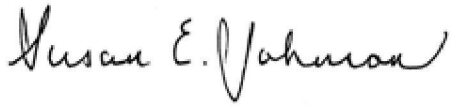
[18] TransUnion web site at http://www.transunion.com/corporate/business/solutions/financialservices/trend-data.page?ref=b_a.. According to the Federal Reserve Board, the delinquency rate (over 30 days) of conventional residential real estate loans booked in domestic offices of commercial banks including home equity lines of credit was 10.03% in 2010 and 10.23% in 2011 to date. Board of Governors of the Federal Reserve System, "Charge-Off and Delinquency Rates on Loans and Leases at Commercial Banks" (2011).

other real estate brokerage firms and homebuilders with affiliated mortgage and title companies will show similar superior delinquency records compared to national and state averages.

Therefore, there is no justifiable reason to disqualify a loan under the QRM definition for the mere reason that an affiliated title company's services are used in conjunction the loan if it otherwise qualifies as a QRM in the final Risk Retention regulation. As RESPRO® pointed out in its comments to the Board in response to its proposed Ability to Repay regulation, an exclusion for affiliated title fees from the 3% "points and fees" threshold in the QRM definition would correct this unwarranted discrimination against mortgage loans in which affiliated title services are used without undermining the goals of Dodd-Frank.

We appreciate the opportunity to submit these comments. If you have any questions you can contact me at 202-862-2051, Ext. 210 or at sjohnson@respro.org.

Sincerely,



Susan E. Johnson, Esq.
Executive Director