Date and Change History:

Date	*Modification*
December 2013	*Legal Advisory Published*
September 2014	*Legal Advisory Revised*

LEGAL ADVISORY

Subject: Affiliates' Guide to Mortgage Rules and Regulations

The purpose of this legal advisory is to provide Habitat affiliates ("Affiliates") a summary of relevant federal laws and regulations that affect Affiliates' mortgage lending. The new mortgage lending rules **effective in January 2014** fundamentally impact portions of Affiliates' mortgage lending practices, including many aspects of origination (including ability-to-repay analysis), servicing, appraisal requirements and required background checks on family selection and origination staff (both paid and unpaid). Affiliates' failure to comply with the relevant new and existing rules and regulations can lead to harsh fines, restrict Affiliates' ability to leverage their mortgages, and negatively impact their relationships with donors and subsidy providers.

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act") created the Consumer Financial Protection Bureau ("CFPB") to protect American consumers from unfair, deceptive and discriminatory practices when purchasing financial services and products. In particular, the CFPB has the authority to monitor and enforce compliance with federal mortgage lending laws and regulations. Increased government regulation of the mortgage industry and harsh penalties for non-compliance make it imperative that Affiliates understand and comply with the laws outlined below. Affiliates are also encouraged to contact a local residential real estate attorney who can provide guidance on state-specific laws related to mortgage origination and servicing and to review the resources provided by HFHI's Mortgage Procedures and Regulations (MPAR) initiative in the MPAR University collection on My.Habitat. *See* http://my.habitat.org/kc/home/mpar. MPAR University provides information on and access to on-line training courses, other checklists and training resources, MPAR FAQs, templates, and detailed guidance on the federal laws.

This legal advisory includes: (i) a discussion of recently-enacted federal regulations; (ii) templates; (iii) links to training materials; and (iv) links to government websites to assist Affiliates in complying with the following relevant federal mortgage lending rules and regulations:

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FAIR HOUSING ACT ("FH Act")

The FH Act makes discrimination practices in residential real estate transactions illegal. 24 C.F.R. § 100.5(a). Specifically, the FH Act makes it unlawful for any person or entity to discriminate against any person because of (1) race, (2) color, (3) religion, (4) sex, (5) handicap (physical or mental disability), (6) familial status (i.e., minors in the household), or (7) national origin during *any* phase of a residential real estate financing transaction, including (1) advertising, (2) inquiry (pre-qualification), (3) application, (4) credit decision/origination, (5) housing design/construction, (6) credit servicing, and (7) credit delinquency enforcement. The FH Act is broad-reaching and applies to residential real estate lenders (including Affiliates), appraisers, landlords, real estate agents, and servicers (including Affiliates). Thus, under the FH Act, Affiliates must treat similarly qualified credit applicants and borrowers/homeowners fairly in all phases of the residential real estate loan transaction.

The FH Act does allow Affiliates to set qualification criteria for a lending/homeownership program. Affiliates, therefore, must follow the HFHI program guidelines, such as (1) need for housing (must be low income and in substandard housing); (2) ability to pay (must have sufficient stable income to own a home and make mortgage payments); and (3) willingness to partner (must be able to do sweat equity with accommodations if necessary, attend classes, etc.). However, the FH Act makes it illegal to set policies and procedures that discriminate based on one of the seven prohibited bases listed above. There are three types of illegal discrimination under the FH Act:

- Overt Discrimination: Blatant discrimination linked to a prohibited basis. For example, a policy that does not make loans to unmarried women would constitute illegal overt discrimination.
- Disparate Treatment: Different treatment of similarly situated individuals, for lack of evidence to the contrary, can be attributed only to a prohibited basis. For example, an Affiliate would be engaging in illegal discrimination through disparate treatment if it charged similarly situated applicants different fees based on a prohibited basis or inconsistently applied policies related to obtaining credit reports.
- Disparate Impact: Occurs when a policy or practice, although applied consistently, has the effect of discriminating on a prohibited basis and is not justified by business necessity. For example, only selling to and financing homes for families that include 2 parents and at least one child and not creating policies and practices that allow for a "family" that may include a one-person household or several unrelated people may constitute disparate impact.

The FH Act makes it illegal to set policies and procedures that discriminate (overt discrimination, disparate treatment, or disparate impact) on one of the seven prohibited bases.

Affiliates and their employees need to be aware of and avoid the 3 types of illegal discrimination during all phases of a residential real-estate transaction, from advertising to loan servicing. [1]

Both the U.S. Department of Housing and Urban Development and the CFPB enforce the FH Act. Violations can lead to large fines against Affiliates. [2]

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[1] The fair lending laws do not per se prohibit practices such as Affiliates offering third-party lending products (e.g., USDA loans). To ensure that Affiliates are not in violation of the fair lending laws when offering different loan products to applicants, Affiliates need to adopt policies that set forth clear criteria for eligibility for the different loan products. The policies must all include a business justification explaining why different products will be offered to different applicants. For example, the practice may help Affiliates access more capital to serve more families. The policies must be followed consistently.

[2] The Home Mortgage Disclosure Act ("HMDA") is another fair lending law. However, Affiliates do not need to comply with HMDA or Regulation C (which implements HMDA) because non-profit lenders are specifically excluded from HMDA. 12 U.S.C. §§ 1003.1(c), 1003.2. For reference, HMDA is a data collection and disclosure law that requires applicable financial institutions to maintain and annually report loan data related to home purchases, home purchase pre-approvals, home improvements, and refinance applications involving 1 to 4 unit and multifamily dwellings.

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Lastly, Affiliates should be aware that the FH Act requires all Affiliates to post the "Equal Housing Lender Poster" in its front office. The Equal Housing Lender Poster states that the institution complies with the FH Act and similar fair lending laws, describes the prohibited bases for which it is illegal to discriminate, and provides contact information to file an FH Act complaint. An example of the Equal Housing Lender Poster can be found at http://portal.hud.gov/hudportal/documents/huddoc?id=928.1.pdf.

FH ACT requires the Equal Housing Lender Poster in the office and the EHO logo on all applications and advertisements.

Affiliates must also include the Equal Housing Opportunity ("EHO") logo on all applications and advertisements as a means of educating the public that the real estate financing and/or property is available to all persons regardless of race, color, religion, sex, handicap, familial status, or natural origin. The equal housing opportunity logo (which size varies with application or advertisement size) can be found at http://portal.hud.gov/hudportal/HUD?src=/library/bookshelf11/hudgraphics/fheologo.

For more information on the FH Act, see the American Bankers Association trainings on the Fair Housing Act and Fair Lending Laws located on My.Habitat at http://my.habitat.org/kc/ page-detail/3f2f6/American-Bankers-Association-Trainings.

For more information on how the FH Act specifically applies to applicants and homeowners with disabilities, Affiliates should review the January 2013 Legal Advisory on "Fair Housing Act Protections For People with Disabilities" located at http://my.habitat.org/kc/download-detail/3e5ad/HFHI-Legal-Advisory-Fair-Housing-Act---Applicants-with-Disabilities-January-2013.

EQUAL CREDIT OPPORTUNITY ACT ("ECOA")

While the FH Act makes discrimination practices illegal in all phases of residential real estate transactions (including sale, rental, and loan origination and servicing), ECOA makes it illegal for a creditor to discriminate in the origination of any credit transaction (including advertising, pre-qualification stage, application, closing, and collection and loss mitigation offerings). ECOA, which is implemented by Regulation B, applies to all "creditors." 12 C.F.R. § 1002.1(a). All Affiliates who originate loans are considered "creditors" and must comply with ECOA requirements since they regularly participate in credit decisions, including setting the terms of credit. 12 C.F.R. § 1002.2(l). ECOA prohibits discriminatory lending practices, and makes it unlawful for any creditor to discriminate against any applicant in the origination of a credit transaction with respect to the applicant's (1) source of income (i.e., whether the applicant receives public assistance), (2) race, (3) color, (4) religion, (5) national origin, (6) sex, (7) marital status, (8) age, or (9) whether the applicant exercised his/her rights in good faith under the Consumer Credit Protection Act. Similar to the FH Act, illegal discrimination can occur through overt discrimination, disparate treatment, or disparate impact. Creditors are allowed to ask applicants for this information in some situations (i.e., for government reporting), but creditors may not consider this

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information when deciding whether to extend credit to an applicant or when setting the terms of the applicant's credit.

In addition to the anti-discrimination requirements, ECOA addresses the importance of keeping applicants informed and sets forth three distinct deadlines by which Affiliates must communicate credit decisions to applicants. 12 C.F.R. § 1002.9.

(1) Affiliate must send an applicant a "Notice of Action Taken" within thirty (30) days of receipt of first piece of financial information (oral or written). The "Notice of Action Taken" can take one of the following forms:

a. Notice of Incompleteness:

i. **NOI**: If the Affiliate needs additional information from the applicant regarding information that applicant can provide to complete evaluation, then the Affiliate must send a notice indicating (1) all information that the applicant must submit to complete the application, (2) the date by which the information must be provided to the Affiliate, and (3) notice that failure to provide information in specified time period constitutes denial without further action from Affiliate. A template for a Notice of Incompleteness can be found on My.Habitat at http://my.habitat.org/kc/download-detail/40186/Notice-of-Incompleteness---Template.

ii. **Informational NOI**: If the applicant has provided all requested information in the required time frame, but the Affiliate needs more time to obtain and evaluate information internally (such as board approval or home visit), then the Affiliate must send a notice indicating the steps the Affiliate will take to complete the application/evaluation from its end. A template for an Informational Notice of Incompleteness can be found on My.Habitat at http://my.habitat.org/kc/download-detail/401cf/Informational-Notice-of-Incompleteness---Template.

b. Denial: If no additional information is required and the Affiliate has decided to deny the applicant, then Affiliate must send an Adverse Action Notice within 30 days of receiving the first piece of information to evaluate. The Adverse Action Notice must contain specific information, including the address of the Affiliate, exact reasons for denial of credit, and a paragraph summarizing the purpose and scope of ECOA. A template Adverse Action Notice can be found at http://my.habitat.org/kc/download-detail/3f423/Adverse-Action-Template. The Fair Credit Housing Act (FCRA) (discussed below) also requires Affiliates to send Adverse Action Notices after credit denial if the decision was based in whole or in part on a credit report or criminal background check. The template Adverse Action Notice Taken meets the requirements for both the FCRA and ECOA.

c. Approval: It is unlikely in the Habitat model that an applicant will be accepted into the Habitat program or for a loan within 30 days of Affiliate receiving the first piece

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of financial information from applicant. Therefore, the Notice of Action sent within the first 30-day deadline will most likely be a Notice of Incompleteness or a Denial rather than an acceptance letter.

(2) **If first Notice of Action Taken is a Notice of Incompleteness, then the following additional deadlines apply:**

a. If the requested information is received from the applicant on or before the established date, then the Affiliate has 30 days to provide another Notice of Action Taken (denial, approval or Informational NOI). As noted above, in cases where the Affiliate still requires a home visit and/or board approval, an Informational NOI must be provided to the applicant advising of the outstanding items to complete the application.

b. If only NOIs have been sent to the applicant, then within thirty (30) days of receiving a "completed application," Affiliate must send applicant either an acceptance or denial notification. Affiliates are strongly encouraged to define "completed application" (for ECOA purposes) in their policies to include all the information normally considered in making a credit decision through the family selection process, including credit checks, background checks, home visits, and board approval. If Affiliates define "application" in their mortgage policies, then Affiliates are able to keep the application process open for several months while evaluating credit without having to send a notice of acceptance or denial to ensure compliance with ECOA (subject to the first ECOA deadline that requires at least one notice within 30 days of receiving the first piece of information from applicant). However, if "application" is not defined in the policy, then an application may be considered complete (for purposes of ECOA) when the Affiliate receives all the information that is regularly required in the mortgage industry to make a decision to extend credit. This "industry standard" that applies to conventional lenders does not always match the Habitat model and may require Affiliates to send a notice of acceptance or denial before they have fully evaluated a potential partner family.

(3) **At any point in the partnership or mortgage application process, within 30 days of making a decision to deny credit, Affiliate must send applicant an Adverse Action Notice.**

Additionally, a recently-enacted portion of ECOA requires that borrowers receive a copy of all appraisals or other written valuations completed in conjunction with their applications. Effective January 2014, Affiliates must provide applicants two additional documents related to appraisals (or other property valuations). 12 C.F.R. § 1002.14.

- <u>A Valuation Disclosure Notice ("Right to Receive Copy of Appraisal Notice")</u>. Within three (3) business days of receiving an application, Affiliates must notify applicants (at the time of their applications) of their right to receive a copy of all appraisals or other written valuations developed in connection with the application (including any estimate of the property's value, and

ECOA Appraisal/ Valuation Rules: (1) Send Right to Receive Copy of Appraisal Notice within 3 days of receiving application; (2) Provide free copy of property valuation "promptly" and at least 3 days before loan closing.

not limited only to formal appraisals). A template disclosure notice can be found at the following link: http://my.habitat.org/kc/download-detail/3f856/Valuation-Disclosure-Notice-Template.

- The Appraisal (or other written valuation). Affiliates must provide applicants with a free copy of all appraisals and other written valuations developed in connection with the credit application for a first-lien mortgage "promptly"[3] upon completion of the appraisal, *and* at least three (3) business days prior to loan closing. Affiliates may ask the borrower to waive the deadline so that any copies can be provided at closing, and may require a reasonable fee for the cost to conduct the valuation. The appraisal requirements apply whether credit is extended or denied or if the application is incomplete or withdrawn.

For more information on ECOA, see the American Bankers Association training on ECOA located on My.Habitat at http://my.habitat.org/kc/page-detail/3f2f6/American-Bankers-Association-Trainings.

FAIR CREDIT REPORTING ACT ("FCRA")

FCRA also requires Affiliates to send Adverse Action Notices within 30 days of denying credit if denial is based in whole or in part on a "consumer report" (credit report or criminal background check). Affiliates can use ECOA/FCRA template on My.Habitat.

The FCRA, which is implemented by Regulation V, was enacted to promote the accuracy, fairness and privacy of information in consumer reports. It applies to consumer reporting agencies, as well as persons and entities who engage in particular activities such as procuring and using consumer reports. 15 U.S.C. §§ 1681 *et seq.*; 12 C.F.R. Part 1022. Accordingly, FCRA generally applies to Affiliates who use credit reports (whether for origination or servicing), but FCRA's specific applicability will depend on particular activities performed by each Affiliate.

The FCRA requires Affiliates to give certain disclosures to an applicant when using any information from a "consumer report" as a factor in establishing the applicant's eligibility for credit. "Consumer report" under FCRA includes credit reports and criminal background checks, both of which are frequently used by Affiliates. If an Affiliate denies an application and this decision is based in whole or in part on any information contained in a consumer report (i.e., credit report or criminal background check), then the Affiliate must provide oral, written, or electronic notice of the denial to the applicant, which notice must include specific information, including notice of the applicant's right to obtain a copy of the credit report and his/her right to dispute the accuracy of the credit report. As discussed above, ECOA also sets forth certain notice requirements when an Affiliate denies credit. Therefore, if an Affiliate denies an application based in whole or in part on any information contained in a consumer report, the Affiliate may

[3] Regulations interpret "promptly" to require Affiliates to provide a free copy of the property valuation within seven (7) days of appraisal completion.

combine both the required ECOA disclosures and the FCRA disclosures in a single notice often referred to as an "Adverse Action Notice." A template Adverse Action Notice can be found at http://my.habitat.org/kc/download-detail/3f423/Adverse-Action-Template.

If an application is denied because of information the Affiliate receives from a source *other than* a consumer credit reporting agency and this information bears on the consumer's creditworthiness, credit standing, credit capacity, general reputation, personal characteristics or mode of living, then Affiliate must notify the consumer that he/she has sixty (60) days to make a written request for the reasons behind the action and the nature of the information that was used. If requested, the Affiliate must then provide the requested information within a reasonable amount of time. The Adverse Action Notice template referenced above contains sample language for this circumstance.

In addition, although HFHI does not recommend that Affiliates use credit scores to determine applicants' creditworthiness, FCRA sets forth certain requirements if an Affiliate does use a credit score. First, Affiliates must disclose additional information on adverse action notices if a credit score was used in taking adverse action (i.e., credit score used, the date and agency from which it was obtained, and up to four key factors that adversely affected the applicant's credit score). The Adverse Action Notice template referenced above contains sample language for this circumstance. Second, if an Affiliate does use a credit score in connection with evaluating creditworthiness, then the Affiliate must provide the applicant with a copy of the credit score and accompanying information, as well as a notice providing information related to each consumer reporting agency that provided a credit score that was used.

If an Affiliate uses a consumer report during the Loan Originator qualification or hiring process, then FCRA requires two disclosures be provided to the applicant/employee if an adverse action must be taken as a result of information in the consumer report. A pre-adverse action letter must be provided to the applicant/employee before taking any adverse action. This notice allows the individual the opportunity to review the report and inform the Affiliate if the consumer report is correct. Then, an adverse action notice must be provided when the adverse action is taken.

Lastly, FCRA provides that a consumer report (i.e., credit report or criminal background check) may be obtained only under certain circumstances which are referred to as "permissible purposes" which include, but are not limited to, (1) a credit transaction involving the extension of credit to, or review or collection of an account of the consumer; and (2) an employment decision *if* written permission has been given by the employee or applicant. Thus, obtaining a consumer report as part of a borrower's application falls under "permissible purposes" even if the applicant has not granted the Affiliate express permission.

Affiliates should be aware that FCRA also imposes obligations on Affiliates who use consumer reports and receive a "notice of address discrepancy" from a consumer reporting agency, which notifies the Affiliate that a substantial difference exists between the address for the consumer that the Affiliate provided and the address(es) in the agency's file for the consumer. 12 C.F.R. § 1022.82. Specifically, Affiliates must develop and implement reasonable policies and procedures to allow the Affiliate to form a

Affiliates must adopt a written Identity Theft Program in order to comply with FCRA and the Red Flags Identity Theft Rule.

"reasonable belief" that a consumer report relates to the consumer about whom it has requested the report when the Affiliate receives a notice of address discrepancy.

Affiliates can comply with the above-referenced portion of the FCRA by complying with the **RED FLAGS IDENTITY THEFT RULE**, issued and enforced by the Federal Trade Commission ("FTC"), which generally applies to users of consumer reports (for provisions regarding address discrepancies) and creditors (for provisions regarding the detection, prevention, and mitigation of identity theft). 16 C.F.R. §§ 681.1(a), 681.2(a). Under the Red Flags Identity Theft Rule, Affiliates must develop a written Identity Theft Program, managed by the Board of Directors or senior employees, that identifies and detects the relevant warning signs (or "red flags") of identity theft and describes appropriate responses that would prevent and mitigate the crime. [4] For more information on the Red Flags Identity Theft Rule, including a sample policy, see the Legal Advisory: Identity Theft Red Flag and Example Policy re: Identity Theft Red Flag located at http://my.habitat.org/kc/download-detail/g32e5b/Legal-Advisory--Identity-Theft-Red-Flag-Sept-2008 and http://my.habitat.org/kc/download-detail/g332f1/ Example-Policy-re-Identity-Theft-Red-Flag.

For more information on the FCRA, see (1) the American Bankers Association training on the FCRA on My.Habitat at http://my.habitat.org/kc/page-detail/3f2f6/American-Bankers-Association-Trainings and (2) the Legal Advisory on Denial Requirements under the Fair Credit Reporting Act, located on My.Habitat at http://my.habitat.org/kc/download-detail/3f422/Legal-Advisory---Denial-Requirements-under-FCRA.

TRUTH IN LENDING ACT ("TILA") – REGULATION Z

The purpose of TILA (and Regulation Z) is to protect consumers in the mortgage loan process and facilitate responsible lending. The rules require timely disclosures of costs and terms and also prohibit unfair, abusive or deceptive home mortgage lending practices. TILA, implemented through Regulation Z, applies to consumer credit transactions, whether or not secured by real property, that are payable by written agreement in more than four (4) installments or are subject to a finance charge. Therefore, all Affiliates must comply with Regulation Z (unless a specific exemption applies). The CFPB amended Regulation Z to further protect consumers in the origination and servicing process as noted below.

a. Qualified Mortgage/Ability-to-Repay Rule and Habitat's Exemption

[4] The Red Flags Identity Theft Rule is issued and currently enforced by the FTC. The FTC generally does not have jurisdiction over non-profits. 15 U.S.C. §§ 41 *et seq.* However, Affiliates should comply with the Red Flags Identity Theft Rule as a best business practice. Further, to date it remains unclear whether CFPB has concurrent jurisdiction over the Red Flags Identity Theft Rule, which would require Affiliates to comply with the rule.

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The CFPB amended Regulation Z to include an ability-to-repay ("ATR") rule, which sets a "ground floor" for what constitutes a reliable mortgage and provides minimum requirements for mortgage originators to consider during the underwriting process. Under the ATR rule, a lender must consider (1) current or reasonably expected income or assets; (2) current employment status; (3) the monthly payment on the covered transaction; (4) the monthly payment on any simultaneous loan; (5) the monthly payment for mortgage-related obligations; (6) current debt obligations, alimony, and child support; (7) the monthly debt-to-income ratio or residual income; and (8) credit history. The CFPB also provided for a Qualified Mortgage ("QM") designation, which if met, conclusively presumes that the lender made a good faith and reasonable ATR determination and will have a "safe harbor" from litigation challenging the ATR determination. Under the rule, mortgages with negative amortization schedules, interest-only payments, balloon payments, no documentation, or terms exceeding 30 years cannot be QM loans. Nor can loans where the points and fees paid by a consumer exceed 3% of the total loan amount. A QM loan must also have monthly payments calculated based on the highest payment that will apply in the first five years of the loan, and the consumer must have a total debt-to-income ratio that is less than or equal to 43%.

Affiliates are exempt from considering the 8 Ability-to-repay underwriting standards if they meet certain criteria (such as extending credit no more than 200 times annually). However, Affiliates are strongly encouraged to comply as a best business practice.

Affiliates are exempt from the ATR rule so long as they meet the following three criteria:

(1) Provide credit only to low-or moderate-income consumers;
(2) Extend credit no more than 200 times annually (including any subordinate mortgages and any repair loan products secured by real property);[5] and
(3) Follow their own written policy and procedures to determine applicants have a reasonable ability to repay.

Even though most Affiliates will be exempt from the ATR rule (assuming they have in place board adopted policies to ensure their applicants have a reasonable ability to repay), the ATR requirements should be considered a best business practice, and Affiliates are strongly encouraged to follow the ATR standards in their underwriting process. Not meeting industry standards may negatively impact an Affiliate's ability to leverage loans with industry and government partners. Additionally, for Affiliates making more than 200 extensions of credit annually, to meet industry standards for a QM loan designation, the loans must not negatively amortize, must not carry balloon payments, and must not have loan terms longer than 30 years.

[5] Affiliates should note that this will include any first mortgages and repair loan products secured by real property. The Consumer Protection Financial Bureau is amending the ATR rule exemption to exclude any subordinate mortgages that meet certain criteria listed in the amendment to the ATR rule to be final in late Fall 2014. When the amendment becomes final, HFHI will update the legal advisory to include the criteria for those subordinate mortgages that will be excluded from the 200 calculation.

b. Truth in Lending Disclosure Statement (TIL Disclosure)

The CFPB rules (through Regulation Z) require that Affiliates provide a TIL Disclosure to the borrower for each mortgage within 3 business days of receiving a "loan application," and at least 7 days prior to closing. For purposes of TILA and RESPA, loan application is defined differently than an "application" under ECOA. Under TILA and RESPA, a loan application is considered complete when the Affiliate has the following information: (1) borrower's name; (2) borrower's monthly income; (3) borrower's SSN; (4) property address; (5) estimate of value of property; (6) loan amount; and (7) other information needed by lender.[6] The TIL Disclosure must contain:

Regulation Z initial disclosures: Truth in Lending Statement -- within 3 days of receiving completed RESPA application and at least 7 days prior to closing.

- Annual Percentage Rate (APR): the cost of credit expressed as a yearly rate.
- Finance Charge: the cost of consumer credit as a dollar amount, including "any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition to the extension of credit (i.e., private mortgage insurance, origination fees).
- Amount Financed: the loan amount plus any other amounts financed by the borrower.
- Total of Payments: the amount financed plus any finance charges; that is, the amount the consumer will have paid after s/he has made all scheduled payments.

A fillable TIL disclosure statement can be found at http://my.habitat.org/kc/download-detail/g331ca/Truth-In-Lending-Disclosure-Statement. A TIL disclosure is required for every loan, including secured and unsecured loans, as well as purchase money mortgages and repair pricing loans.

If certain terms listed in the TIL Disclosure change (such as plus or minus .125 change in APR), then the Affiliate must provide a revised TIL within 3 business days of the change and within at least 3 business days prior to closing. If a revised TIL Disclosure is provided, then the Affiliate must wait an additional 7 days from mailing to close the loan. For more information on the TIL disclosure statement, see the American Bankers Association training titled "Regulation Z Overview" located on My.Habitat at. http://my.habitat.org/kc/page-detail/3f2f6/American-Bankers-Association-Trainings.

[6] It would be prudent for Affiliates to treat information as "complete" for purposes of RESPA and TILA if the six other pieces of information have been provided even if Affiliate has not yet received its other "affiliate-required" information. The seventh element is no longer included as of **August 1, 2015**.

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c. Right of Rescission (For Repair Product Loans Secured by Principal Dwelling)

Regulation Z gives borrowers the right to cancel the credit transaction within 3 business days of signing the loan documents and qualify to receive a full refund of any monies paid. This "cooling off period" only applies to loans on a consumer's principal dwelling other than a transaction to purchase the dwelling. Therefore, most Habitat mortgages would not be subject to the right of rescission since the loans are made to purchase the dwelling. Repair product loans, however, would be subject to this right of rescission if the Affiliate is taking a security interest in the borrower's dwelling. The right of rescission is also not available for refinances with the same lender when no new money is advanced. For more information on the Regulation Z Right of Rescission, see the American Bankers Association training on Right of Rescission located on My.Habitat at http://my.habitat.org/kc/page-detail/3f2f6/American-Bankers-Association-Trainings.

d. Valuation Independence and Appraiser Compensation

The new CFPB rules amended Regulation Z to prohibit conflicts of interest in property valuation. Affiliates cannot attempt, directly or indirectly, to cause the valuation of a property to be based on anything other than the independent judgment of the person preparing the valuation. Affiliates must ensure that no person performing a valuation service on behalf of the Affiliate has a direct or indirect interest, financial or otherwise, in the property. Consequently, an Affiliate board or staff member who is an appraiser should not prepare the valuation or perform valuation management functions for a transaction that the Affiliate is involved in except in the case of very limited safe harbor conditions. Additionally, the CFPB amended Regulation Z to require appraisers to be paid a customary and reasonable fee. The CFPB has provided verbal authorization to HFHI that Affiliates may continue to utilize donated or discounted appraisal services from independent appraisers and HFHI is currently working to have legislation enacted that will allow affiliates to accept donated appraisals.

Per verbal guidance from the CFPB, Affiliates can still utilize donated appraisals from independent appraisers.

For more information on TILA and Regulation Z, see the American Bankers Association training titled "Regulation Z Mortgages (Closed End Credit)" located on My.Habitat at http://my.habitat.org/kc/page-detail/3f2f6/American-Bankers-Association-Trainings.

REAL ESTATE SETTLEMENT PROCEDURES ACT ("RESPA") – REGULATION X

RESPA and its implementing regulation, Regulation X, applies to every "federally-related mortgage loan." Since all Affiliates are now regulated by the Consumer Financial Protection Bureau and Affiliate loans are classified as "federally-related mortgage loans," RESPA now applies to all Affiliates and not just those Affiliates that originate more than $1 million in residential real estate loans per year.

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a. Disclosures

Affiliates must provide certain initial disclosures to the borrower within 3 business days (including Saturdays) of receiving a "loan application" and at least 7 days prior to closing. As stated above for purposes of TILA and RESPA, loan application is defined differently than an "application" under ECOA. Under TILA and RESPA, a loan application is considered complete when the Affiliate has the following information: (1) borrower's name; (2) borrower's monthly income; (3) borrower's SSN; (4) property address; (5) estimate of value of property; (6) loan amount; and (7) other information needed by lender.[7]

Regulation X initial disclosures:

(1) GFE;

(2) CFPB Settlement Cost Booklet

(3) Servicing Disclosure Statement

(4) Affiliated Business Arrangement Disclosure

(5) List of Homeownership Counseling Organizations

- The Good Faith Estimate (GFE) of Settlement Costs lists the charges that the borrower is expected to pay at closing. The amounts listed on the GFE must be available for at least 10 business days. Once the borrower has accepted the terms stated in the GFE, then the Affiliate can only make changes if there is a "changed circumstance" or borrower-requested change. Changed circumstances include (1) acts of God, war, disaster or other emergency, (2) information particular to the borrower or transaction that was relied on in providing the GFE changes or is found to be inaccurate (including credit quality of borrower or estimated value of property), and (3) new information or circumstantial changes particular to the borrower or transaction (i.e., boundary dispute, environmental problem). If the change is not due to changed circumstances or a borrower-requested change, then no change can be made to origination fees or transfer taxes ("zero tolerance rule"). A revised GFE must be provided within 3 business days of receiving the information sufficient to establish the changed circumstance or borrower-requested change. For a (1) fillable GFE, (2) an example GFE, (3) a checklist for filling out the GFE, and (4) a GFE cover letter, see the RESPA/TILA resources collection located at http://my.habitat.org/kc/collection-detail/3f83e/Initial-Disclosures.

- The CFPB Settlement Cost Booklet contains consumer information regarding various real estate settlement services. It was formerly known as the HUD Special Information Book and can be found at http://files.consumerfinance.gov/f/201401_cfpb_booklet_settlement.pdf.

[7] It would be prudent for Affiliates to treat information as "complete" for purposes of RESPA and TILA if the 6 other pieces of information have been provided even if Affiliate has not yet received its other "affiliate-required" information. The 7th element is no longer included as of **August 1, 2015**.

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- The Servicing Disclosure Statement discloses to a borrower whether the lender intends to service the loan or transfer it to a third-party servicer. An example Servicing Disclosure Statement may be found at http://my.habitat.org/kc/download-detail/g331c9/Mortgage-Servicing-Disclosure-Form. When an actual transfer of servicing occurs, then the Affiliate is required to notify the borrower at least 15 days before the loan is transferred. This notice is commonly referred to as a "Hello/Goodbye Letter."

- The Affiliated Business Arrangement Disclosure is required whenever the consumer is referred for a settlement service to a provider with whom the Affiliate has an ownership, relationship, or beneficial interest. For example, this disclosure is needed if the Affiliate refers a borrower to a board member who provides legal work related to loan origination. The Affiliated Business Arrangement Disclosure must be given to the borrower at or prior to the time of referral. An example Affiliated Business Arrangement Disclosure may be found at http://www.gpo.gov/fdsys/pkg/CFR-2012-title12-vol8/pdf/CFR-2012-title12-vol8-part1024-appD.pdf (see Appendix D to Part 1024).

- List of Homeownership Counseling Organizations: Affiliates must use the following link to create a list of HUD-certified counseling organizations in their area. http://www.consumerfinance.gov/find-a-housing-counselor.

Regulation X final disclosures:
(1) HUD-1 Statement;

(2) Initial Escrow Statement

In addition to the initial disclosures, Affiliates must also provide certain RESPA disclosures at loan closing.

- The HUD-1 Statement itemizes the settlement services provided by the Affiliate and the fees associated with these services. It also shows all charges imposed on the Affiliate and borrower in connection with the closing. The HUD-1 Statement must be provided to borrowers at least 1 day prior to closing. A sample HUD-1 and HUD-1 instructions can be found in the following sub-collection on My.Habitat at http://my.habitat.org/kc/collection-detail/3f2e8/Closing-and-Disclosures.

- Affiliates must also provide an initial escrow statement, which itemizes the estimated taxes, insurance premiums and other charges anticipated to be paid from the escrow account during the first 12 months of the loan. The statement is usually given at closing, but it can be delivered up to 45 calendar days from closing. A sample initial escrow statement can be found at http://my.habitat.org/kc/download-detail/3ee3a/First-Year-Escrow-Sample.

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b. Escrow Management

RESPA does not require lenders to maintain an escrow account, but HFHI strongly recommends Affiliates establish escrow accounts to ensure manageable payment of taxes, insurance, and other charges related to the property. Escrow accounts must be held in a financial institution that is federally insured by the Federal Deposit Insurance Corporation (FDIC) or National Credit Union Share Insurance Fund (NCUSIF) and must be separate from all other accounts and cannot be commingled with operating funds.

When an escrow account is established, RESPA requires Affiliates to conduct an escrow analysis and deliver the statement to the homeowner at closing or within 45 calendar days of closing. The regulation also limits the amount of money that an Affiliate may require a homeowner to deposit. For example, an Affiliate cannot require a homeowner to pay into the escrow account monthly more than 1/12 of the total of all disbursements that must be paid during the year. While an Affiliate can collect a reserve monthly, the total payment cannot be greater than 1/6 (2 months) of the estimated annual payments. In addition, Affiliates must also conduct an annual escrow analysis and send annual escrow account statements within 30 calendar days of the end of the "computation" year that address surplus, shortage, and deficiency amounts. For more information on escrow management, calculations, and statements, see the resources contained in the Escrow Management sub-collection located at http://my.habitat.org/kc/collection-detail/3f2ea/Escrow-Management.

c. Force-Placed Insurance

Under the CFPB amendments to Regulation X's Small Servicer exemption, Affiliates are required to purchase force-placed insurance to protect their interest in the property only if the cost of the force-placed insurance to the consumer is equal to or less than the cost of hazard insurance to the homeowner. If Affiliates cannot find force-placed insurance meeting this standard, then they are not required to purchase it. However, if the Affiliate does choose to require force-placed insurance, then the CFPB amendments prohibit a servicer from charging a borrower for force-placed insurance unless it has a reasonable basis to believe the borrower has failed to maintain hazard insurance and has provided the required notices. The initial notice must be sent to the borrower at least 45 days before charging the borrower for forced-place insurance coverage. The second notice must be sent no earlier than 30 days after the first notice and at least 15 days before charging the borrower for the insurance. And, after the force-placed insurance is in place, servicers must send an annual notice to borrowers 45 days before charging for, renewing, or replacing such insurance. Lastly, if the borrower provides proof of hazard insurance coverage, then the servicer must within 15 days cancel the force-placed insurance coverage and refund any premiums paid for periods in which the borrower's coverage was in place.

For more information on RESPA rules and regulations see the presentations and legal advisories located at http://my.habitat.org/kc/ collection-detail/g357f1/RESPA-and-TILA-Resources.

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SMALL SERVICER SERVICING REQUIREMENTS (REGULATIONS X AND Z)

The servicing amendments of Regulations X and Z are especially onerous. Fortunately, the CFPB rules include some exemptions for "small servicers," which exemption encompasses many Affiliates. Small servicers are defined as servicers who service 5,000 or fewer loans and service only mortgage loans that they own.

However, despite the small servicer exemption, Affiliates (as small servicers) still need to comply with the servicing regulations listed below.

- **Prompt Crediting of Payments**: Affiliates must credit mortgage payments on the same day they were received. If payment is less than the full amount due, servicers are permitted to hold partial payments in a suspense account. Once the amount in the suspense account equals one full monthly payment (principal and escrow), the servicer has to apply the amount to the earliest delinquent payment.

- **Prompt Response to Request for Payoff**: Affiliates must provide an accurate mortgage payoff balance to a consumer no later than 7 business days after a borrower requests such information.

- **No "Pyramid" of Late Fees**: Affiliates cannot "pyramid" late fees, which means when a periodic payment (principal and escrow) is received it must be applied even when an outstanding balance of a previously unpaid late fee or delinquency charge exists. It is important that in cases like this, homeowners are notified of outstanding balances and consequences as per loan documents and/or policy.

- **Error Resolution and Information Request**: Affiliates must respond to information requests or error complaints from borrowers within 5 days of receipt either with an acknowledgment of the request or by correcting the error. After an acknowledgment is sent to the borrower, the Affiliate has 7 days to correct a payoff error, or 30 days to correct other errors (that can be extended for up to 15 days for errors other than payoffs and foreclosure procedures).

- **Loss Mitigation and Delinquency**: Despite exemption from many servicing requirements, small servicer Affiliates must adopt delinquency policies and procedures that meet the following requirements:
  - Affiliates must establish or make good faith efforts to establish live contact with delinquent borrowers by the 36th day of their delinquency.

"Small Servicers" are exempt from many Reg X and Z amendments. However, they still must comply with certain requirements, such as (1) prompt crediting of payments and response to request for payoff, (2) error resolution and information request, and (3) loss mitigation and delinquency.

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  - Before the 45th day of delinquency, Affiliates must include in a demand letter a notice to the homeowner of the availability of homeownership counseling offered by HUD and the Affiliate (if applicable). Specifically, the default letter should say: "You may contact the Department of Housing and Urban Development at 1-800-569-4287 to obtain a list of HUD-approved nonprofit homeownership counseling organizations. [In addition, we have available for you (insert description of homeownership counseling offered by the Affiliate, if any).]"
  - Affiliates cannot "initiate" foreclosure proceedings (1) until a borrower is more than 120 days delinquent; and (2) if a homeowner is performing pursuant to the terms of a loss mitigation agreement, which prohibited practice is commonly known as "dual tracking."

  For a sample delinquency policy and procedure that: (i) meets the Regulation X Amendments; (ii) instructs on how to calculate the first day of "deficiency;" and (iii) includes template default letters, see http://my.habitat.org/kc/download-detail/3f414/Sample-Delinquency-and-Foreclosure-Policy-and-Procedure.

- **Periodic Statements (exempted as small servicers, but recommended as best practice)**: Small servicers are exempt from the periodic statements provisions of Regulation Z. However, Affiliates are encouraged to comply with these regulations as a best business practice, either by way of a monthly statement or a coupon book. Regulation Z requires that lenders provide periodic statements to borrowers by hand-delivery or mail within a reasonable time after the payment due date. The periodic statements must include (1) amount of the principal obligation, (2) current interest rate, (3) information on prepayment penalties and late fees, (4) contact information for the servicer and home counseling information, (5) upcoming payment information, (6) past payments, and (7) a list of recent transaction activity. For more information on periodic statements and coupon books, see http://my.habitat.org/kc/download-detail/3fd38/Periodic-Statements-and-Coupon-Books.

GRAMM-LEACH-BLILEY ACT ("GBLA")

The GLBA, which is implemented by Regulation P, broadly applies to all "financial institutions," 12 U.S.C. § 1843(k), and protects "nonpublic personal information" that financial institutions collect from individuals.[8] Affiliates are considered "financial institutions" because they engage in lending activities

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[8] Nonpublic personal information covered by GLBA includes information (1) an applicant provides during the application process, (2) resulting from any transaction between Affiliate and consumer related to the loan or financial service, or (3) obtained about a consumer in connection with providing the financial service. 15 U.S.C. § 6809(4). Thus, most information obtained by an affiliate during the loan application process will fall under this description. However, publicly listed telephone numbers or other publicly available information would not fall under GBLA.

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(whether origination, servicing, or both) and, thus, must comply with GLBA requirements. An Affiliate's duties under GLBA generally include, but are not limited to, providing initial and annual disclosures of the Affiliate's privacy policy and adhering to limitations on how the Affiliate may use or disseminate a consumer's or customer's nonpublic personal information to third parties. *See* 15 U.S.C. §§ 6801-6809.

For purposes of GLBA, "consumer" is an applicant and "customer" is a consumer who has a continuing relationship with the Affiliate.

For purposes of GLBA, there is an important distinction between a "consumer" and a "customer." A "consumer" is anybody who applies for a loan, whether or not the individual actually obtains the loan. A "customer" is a consumer who has a continuing relationship with the Affiliate. The customer relationship is established when an affiliate originates the loan to the homeowner, and the customer relationship is terminated if the affiliate sells the mortgage (even if the affiliate retains recourse) or transfers full servicing rights.[9] In the Habitat setting, Affiliates often transfer only "sub-servicing" rights to third-party servicers, in which case the customer relationship continues for the Affiliate and the homeowner.

Affiliates should provide all applicants with a Privacy Notice when the "customer" relationship is established and annually thereafter.

Subject to the timelines discussed below, Affiliates must provide their consumers (i.e., applicants) and customers (i.e., homeowners) with a clear and conspicuous privacy notice ("Privacy Notice") that accurately reflects its privacy policies and practices.[10] The Privacy Notice should include the following information: (1) categories of nonpublic personal information the Affiliate collects; (2) categories of nonpublic personal information the Affiliate discloses; (3) types of third parties to which the nonpublic personal information may be disclosed; (4) the manner in which the consumer/customer can prohibit the Affiliate from sharing nonpublic personal information (i.e., an "opt-out" provision)[11]; and (5) the ways in which the Affiliate protects nonpublic personal information. The Privacy Notice can be mailed, delivered in person, or posted on the Affiliate's website. It cannot, however, just be posted in the Affiliate's office. A sample Privacy Notice that meets the GLBA requirements can be found as Exhibit A to the Legal Advisory on GLBA requirements, located

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[9] However, if the Affiliate sells the loan but *retains servicing duties*, then the customer relationship remains. 12 C.F.R. § 1016.4(c)(2).

[10] To the extent that Affiliates operate in states that have codified their own privacy statutes, Affiliates must provide privacy disclosures as required by those state laws.

[11] The Affiliate must provide the customer or consumer with at least one "reasonable means" of opting out. 12 C.F.R. § 1016.7. What is reasonable will depend on the affiliate's customer/consumer population, and may include (i) check-off boxes prominently displayed on the Privacy Notice, (ii) a reply form included with the Privacy Notice, and/or (iii) a local or toll-free phone number. The affiliate may require only one specific means to opt out, as long as that means is reasonable for the specific consumer/customer population. 12 C.F.R. § 1016.7. Affiliates should note that an electronic means to opt out is likely not a form of "reasonable means" to opt out in the Habitat setting.

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at http://my.habitat.org/kc/download-detail/g32e5a/HFHI-Legal-Advisory--Gramm-Leach-Bliley-Act-Requirements-August-2014.

The timing of the Privacy Notice depends on whether the individual is defined as a "consumer" or a "customer." Under federal law, Affiliates must provide an initial Privacy Notice no later than when the ongoing, "customer" relationship is established. Affiliates may consider providing the initial Privacy Notice with or before the RESPA and TILA initial disclosures, so long as this timing provides the customer with a "reasonable" amount of time to exercise his/her opt-out rights.[12] As a best business practice, it is recommended that those Affiliates using third-party lenders provide the initial Privacy Notice at an earlier time and with the application materials. Thereafter, Affiliates must send an annual Privacy Notice to customers (e.g., homeowners) at least once in any 12 consecutive months, so long as the customer relationship remains. As to consumers who do not become customers (e.g., if application is denied), the Affiliate only needs to send a Privacy Notice to the consumer if the Affiliate thereafter shares the nonpublic personal information with a "non-affiliated third party." Under the Act, "non-affiliated third parties" would generally include all parties who are not employees of the Affiliate. As a practical matter, since only the Affiliate's Family Selection Committee sees most of the personal information submitted by applicants who are denied credit (i.e., "consumers") , Affiliates do not typically disclose information in a manner that requires additional Privacy Notices to consumers (i.e., applicants denied credit).

GLBA recognizes certain exceptions, under which an Affiliate can share nonpublic personal information with non-affiliated third parties (i.e., non-Habitat employees) without sending a Privacy Notice *even if* a customer or consumer exercises his/her "opt-out" option. The exceptions include sharing information (1) with outside companies that provide loan services (i.e., marketing, servicing, or title companies); (2) in response to a subpoena or reporting to the IRS or credit reporting agency; and (3) with bank regulators as part of an examination. Examples and an extended discussion of these exceptions to the Privacy Notice requirement under the GLBA can be found in the Legal Advisory on GLBA requirements, located at http://my.habitat.org/kc/download-detail/g32e5a/HFHI-Legal-Advisory--Gramm-Leach-Bliley-Act-Requirements-August-2014.

For more information on the GLBA, see the American Bankers Association training titled "Privacy for Customer Contact Personnel" located on My.Habitat at http://my.habitat.org/kc/page-detail/3f2f6/American-Bankers-Association-Trainings.

[12] The Consumer Financial Protection Bureau considers 30 days from the date of mailing a reasonable amount of time for the customer to exercise his/her opt-out rights. *See* Manual v.2, GLBA Privacy, Consumer Financial Protection Bureau (October 2012).

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FLOOD DISASTER PROTECTION ACT ("FDPA")

The FDPA applies generally to entities subject to federal lending regulations, which includes Affiliates. The FDPA provides generally that if a certain property falls in a "special flood hazard area" (as defined below), then before the Affiliate can extend, modify, or renew credit secured by real property (other than raw land) the Affiliate must comply with the FDPA requirements. *See* 42 U.S.C. § 4001 *et seq*.

The FDPA requires Affiliates to first determine whether the property securing the loan is in a special flood hazard area ("SFHA"). In order to meet this requirement, Affiliates must provide a property description to a certified vendor that has the current FEMA flood map. For a list of vendors who provide National Flood Insurance Program ("NFIP") services, see http://www.fema.gov/national-flood-insurance-program/flood-zone-determination-companies#note.[13] The certified vendor will inform the Affiliate through a flood certificate (1) whether the property falls within a SFHA and (2) whether that particular community is participating in the NFIP. The NFIP makes flood insurance available to certain flood prone areas at a reasonable cost through a joint program involving the federal government and the private insurance industry.

If a property is in a SFHA that is participating in NFIP insurance, then the Affiliate must notify the homeowner of the NFIP available insurance and require that the homeowner purchase the flood insurance from NFIP prior to closing the loan.

If the property is in a SFHA that is participating in NFIP insurance then the Affiliate must provide a "Notice of Special Flood Hazard Area," which notifies the homeowner of the flood hazard and the requirement to purchase NFIP flood insurance prior to closing. Affiliates must provide the FDPA notice to the homeowner in sufficient time to allow the homeowner to obtain NFIP flood insurance prior to closing the loan. A sample Notice of Special Flood Hazard Area can be found at the following link: http://www.fema.gov/media-library-data/20130726-1438-20490-8829/086_0_32.pdf. For properties in SFHA participating in NFIP insurance, Affiliates must obtain proof of insurance prior to loan closing and ensure that the insurance remains in force for the life of the loan (which is often referred to as "life of loan monitoring"). In addition, it is highly recommended that Affiliates require escrow of flood insurance premiums and fees.

If the property is in a SFHA but in a community that does not participate in NFIP insurance, then the Affiliate must notify the homeowner that the property is in a federally identified SFHA but NFIP insurance is not available. This requirement is satisfied by using the same form Notice of Special Flood Hazard Area as referenced above. Although not required under FDPA through NFIP insurance, it is highly recommended that the Affiliate require the borrower to purchase private flood insurance to protect the asset as a best business practice.

[13] HFHI does not approve or endorse any NFIP vendor on the list, but rather provides the list for informational purposes only.

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Affiliates should note that if the property is not in a SFHA, then the only action that the Affiliate must do is keep the flood certificate in the applicant's mortgage file. The Affiliate is not required to provide a Notice of Special Flood Hazard Area.

For more information on the FDPA, see the American Bankers Association training titled "Flood Disaster Protection Act" located on My.Habitat at http://my.habitat.org/kc/page-detail/3f2f6/American-Bankers-Association-Trainings.

RECAP: MORTGAGE DISCLOSURES

Requirements	Disclosures
Early/Initial disclosures	• **Good Faith Estimate (GFE)** (RESPA/Reg X) • **CFPB Settlement Cost Booklet** (RESPA/Reg X) • **Servicing Disclosure Statement** (RESPA/Reg X) • **Affiliated Business Arrangement Disclosure** (RESPA/Reg X) • **List of Homeownership Counseling Organizations** (RESPA/Reg X) • **Truth in Lending Disclosure Statement** (TILA/Reg Z) • **Right to Receive Copy of Appraisal/Property Valuation** (ECOA) and then **Appraisal/Property Valuation** (ECOA) • **Initial Privacy Notice** (GLBA – when "consumer" becomes "customer") • **Flood Disclosure Notice** (FDPA)
Closing disclosures	• **HUD-1** (RESPA/Reg X) • **Initial Escrow Statement** (RESPA/Reg X) • **TIL Final Disclosure Statement and Final GFE** (if applicable, TILA/Reg Z; RESPA/Reg X) • **Right of Rescission** (Under TILA/Reg Z for repair product loans when a lien is placed on the principal dwelling)
Ongoing	• **Annual Escrow Account Statements** (RESPA) • **Annual Privacy Notice** (GLBA, ongoing to "customers" and to "consumers" if sharing non-public personal information with a non-affiliated third party)

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FEDERAL LAWS RELATING TO CRIMINAL FINANCIAL ACTIVITIES, INCLUDING ANTI-MONEY LAUNDERING ("AML")

The U.S. Treasury Department's Financial Crimes Enforcement Network ("FinCEN") requires that, as of August 13, 2012, all Affiliates have a written anti-money laundering ("AML") policy and program in place (including a designated AML compliance officer), report suspicious activities through a "Suspicious Activity Report," and comply with certain recordkeeping requirements. *See* 31 C.F.R. Part 1029. For more information, see the Anti-Money Laundering Homepage, which provides policies, procedures, and templates that Affiliates must adopt or risk severe civil and criminal penalties: http://my.habitat.org/kc/home/aml.

All Affiliates must have an AML policy and program in place or risk severe criminal and civil penalties. Visit the AML homepage for sample policies and templates. http://my.habitat.org/kc/home/aml.

In addition, the Office of Foreign Assets Control ("OFAC"), pursuant to Executive Order 13224, requires that all entities organized under the laws of the U.S., including Affiliates, are prohibited from engaging in any transaction or dealing in property or interest with any blocked country or any person or entity on the Specially Designated Nationals List ("SDN List"), which can be found at http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx. The U.S. Patriot Act also requires that Affiliates search all applicants against the SDN List, for new and existing borrowers, initially and ongoing. It also requires Affiliates to report cash payments received over $10,000 on IRS Form 8300. 31 C.F.R. §§ 1029.330, 1010.330.

SECURE AND FAIR ENFORCEMENT FOR MORTGAGE LICENSING ACT ("SAFE ACT")

The federal SAFE Act requires each state to set minimum standards for licensing mortgage loan originators working in their state. In 2011, HUD issued a ruling clarifying that "bona fide" nonprofits are outside the scope of the federal SAFE Act. Thus, Affiliates in *most states* are exempt from the federal SAFE Act since they can demonstrate that they meet the "bona fide" nonprofit requirements and do not need to comply with the SAFE Act loan originator standards. For templates and instructions on how to obtain the bona fide nonprofit exemption from your state banking regulators, see the SAFE Act sub-collection located at http://my.habitat.org/kc/collection-detail/3f2e6/Pre-Application~Application-Process. HFHI worked closely with the CFPB to ensure the new SAFE Act regulations, effective January 2014, do not impact the state and federal exemptions currently enjoyed by many Affiliates. The new SAFE Act regulations, Regulations G and H, expressly provide that they do not impact state determinations or the existing HUD bona-fide nonprofit exemption.

LOAN ORIGINATOR REQUIREMENTS UNDER TRUTH IN LENDING ACT

While the new regulations do not impact the SAFE Act bona-fide nonprofit exemption, they do (through TILA/Regulation Z) provide that loan originator organizations, such as the Affiliates, must meet two additional requirements related to their "Loan Originator Employees," which two requirements are more fully discussed below. **This new rule must be followed even in states where a SAFE Act exemption is in place for bona-fide nonprofits.**

As a preliminary matter, the CFPB identifies a "loan originator" as an individual that is compensated who performs the following activities:

- Taking an application.
- Arranging a credit transaction.
- Assisting a consumer in applying for credit. A loan originator assists a consumer in obtaining or applying for credit by advising on particular credit terms that are or may be available to the consumer based on the consumer's financial characteristics.
- Offering or negotiating credit terms. Credit terms include rates, fees and other costs. Credit terms are selected based on the consumer's financial characteristics when those terms are based on any factors that may influence a credit decision, such as debts, income, assets or credit history.
- Making an extension of credit.
- Referring a consumer to a loan originator or creditor. Referring is an activity included under each of the activities of offering, arranging, or assisting a consumer in obtaining or applying to obtain an extension of credit.
- Advertising or communicating to the public that you can or will perform any loan origination services.

CFPB Amendments do not change the SAFE Act "bona fide" nonprofit exemption. However, Affiliates must now conduct background checks on and provide training to "loan originator employees" under new TILA regulations.

Generally speaking in the Habitat setting, loan originator employees would be those staff members who interface with the consumer. It would not include employees performing solely administrative or clerical tasks (including accepting applications at the front desk), board members who solely review documents, or staff whose tasks are limited to back-office underwriting analysis and calculations. Lastly, the TILA

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Loan Originator Qualification rule specifically identifies compensated employees; however, HFHI defines loan originators as employees and key volunteers [14] who perform the activities referenced above.

As to new requirements related to the loan originator employees, Affiliates must fulfill the following:

(1) Affiliates must ensure that all "loan originator employees" meet character, fitness, and criminal background standards similar to existing SAFE Act licensing standards. This includes running national background and criminal checks on loan originator employees hired after January 1, 2014, and obtaining information related to any civil, criminal, or administrative determinations against them.[15] Affiliates can adopt more stringent policies as to how they will evaluate this information to ensure character and fitness of their loan originator employees. Federal law, however, sets a minimum standard that the loan originator must not have been convicted of, or pled guilty or nolo contendere to, a felony during the preceding 7-year period, or, in the case of a felony involving an act of fraud, dishonesty, a breach of trust, or money laundering, at any time; and

(2) Affiliates must provide periodic training to their loan originator employees that is appropriate and consistent with those employees' origination activities. The 11 American Bankers Association Trainings, specifically adopted to the Habitat model, will satisfy the federal Loan Originator training requirements if taken annually.[16] All loan originator staff and volunteers are encouraged to register for the trainings found on My.Habitat at http://my.habitat.org/kc/page-detail/3f2f6/American-Bankers-Association-Trainings.

Additionally, as noted above, Affiliates must still obtain exemption from their state banking regulators.

OTHER REGULATIONS THAT IMPACT AFFILIATES

- **Unfair, Deceptive, or Abusive Acts or Practices ("UDAAP")**: Affiliates (whether they are originators, servicers, or both) are subject to the CFPB's enforcement and rulemaking under UDAAP. The CFPB has statutory authority to issue and enforce specific regulations to prevent Affiliates from "committing or engaging in an unfair, deceptive, or abusive act or practice under federal law in connection with any transaction with a consumer." Pub. L. No. 111-203, 124 Stat. 1376 (2010). UDAAP (along with TILA) prohibits unfair, deceptive, misleading or abusive

[14] Key volunteer generally refers to any individual who works eight (8) or more hours each month and/or has contact with vulnerable populations such as children, the elderly or persons with disabilities.
[15] For loan originator employees hired prior to January 1, 2014, Affiliates must conduct background checks for employees where no applicable statutory or regulatory background standards were in effect at the time of hire to screen that individual, or the applicable standards were not used to screen that individual.
[16] Affiliates should be aware that any state training requirements (if applicable) will still have to be met.

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advertisements, marketing or promotional materials. Affiliates must ensure that all outreach and marketing materials are entirely accurate. For example, if Affiliates are offering third-party loan products such as USDA loans, Affiliates cannot advertise "0% loans" because this would be inaccurate in the USDA setting.[17]

- **Servicemembers Civil Relief Act ("SCRA"):** The SCRA protects persons called to active military service and their dependents from undue hardship resulting from their military service. Affiliates must comply with provisions of the SCRA when a borrower is a member of the Army, Navy, Marine Corps, Air Force, Coast Guard, National Guard, or a commissioned officer of the Public Health Service or National Oceanic and Atmospheric Administration. *See* 50 U.S.C. App. §§ 501 *et seq.* The protection period under SCRA commences when a borrower enters active duty and normally terminates when the servicemember is released from active service, and this protection period may continue for up to 90 days after release. During the protection period, lenders cannot: (1) charge interest over 6%; (2) charge late fees; (3) initiate foreclosure proceedings; or (4) otherwise enforce a breach under the note or mortgage – without prior approval from a court of competent jurisdiction waiving the SCRA protection period. Principal payments, however, remain due and accruing during the protection period. This means that Affiliates can require that the servicemember continue to pay the principal monthly payments during active duty. However, if principal payments are missed during the protection period, Affiliates cannot charge late fees, send default notices, or initiate foreclosure proceedings. Instead, Affiliates can require that the total missed monthly principal payments be paid immediately after the protection period ends (i.e., 90 days after return from active duty). As a best business practice though, HFHI encourages Affiliates to work with the servicemember borrowers to set up a mutually acceptable payment plan for the monthly principal payments that may have accrued during the protection period. Lastly, if a homeowner qualifies for protection under the SCRA and becomes delinquent (whether on active duty or not), Affiliates must send the Servicemembers Civil Relief Act Notice Disclosure (found at the following link) prior to the 45th day of delinquency. http://portal.hud.gov/hudportal/documents/huddoc?id=92070.pdf.

- **Fair Debt Collection Practices Act ("FDCPA"):** The FDCPA applies generally to debt collectors and puts restrictions on collection efforts, such as (i) no calls to places of employment; (ii) no calls late at night or very early; and (iii) no threats to take actions not legally allowed. 15 U.S.C. § 1692 *et seq*. The FDCPA applies to a subset of Affiliates – ones that service mortgage loans for a third party that they did not originate (i.e., another Affiliate) and that were in default at

[17] Notably, Affiliates are not *per se* subject to the CFPB's Mortgage Acts and Practices (MAPS Rule), which is implemented by Regulation N and related to UDAAP in that it prohibits certain deceptive practices when *engaging in advertising activities*. 12 C.F.R. § 1014.1. Affiliates, however, are encouraged to comply with the MAPS Rule as a good business practice if the Affiliates engage in advertising activities. Indeed, many of the MAPS Rule violations would also constitute a violation under UDAAP.

the time the servicing Affiliate acquired it. If an Affiliate meets the criteria to fall under the FDCPA, then it should exercise extreme caution when engaging in collection efforts.

- **Homeowners Protection Act (“HPA”):** Affiliates must comply with HPA if they require a borrower to pay private mortgage insurance (“PMI”). The specific limitations, obligations, and disclosure requirements under HPA depend on whether the PMI is borrower-paid or lender-paid and whether the loan is considered “high risk.” *See* 12 U.S.C. §§ 4901 *et seq*.

- **Vendor Due Diligence**: The CFPB published an advisory bulletin stating that financial institutions under the CFPB’s supervisory authority (which includes all Affiliates) may be held responsible for the actions of certain companies with which they interact. The CFPB wants to ensure that consumers are protected from potentially irresponsible lending practices of the direct financial institution as well as the service providers contracting with the financial institution. This means that when an Affiliate contracts with a third-party originator or third-party servicer, the Affiliate must take steps to ensure that the business arrangements with the service provider (third-party originator or servicer) do not present unwarranted risks to consumers. If Affiliates do not conduct proper due diligence on their third-party service providers, then they may be subject to fines from the CFPB based on the service provider’s actions. Therefore, Affiliates should take the following steps relating to vendor due diligence:

    - Conduct thorough due diligence to verify that the service provider understands and is capable of complying with Federal consumer financial law;
    - Request and review the service provider’s policies, procedures, internal controls, and training materials to ensure that the service provider conducts appropriate training and oversight of employees or agents that have consumer contact or compliance responsibilities;
    - Include in the contract with the service provider clear expectations about compliance, as well as appropriate and enforceable consequences for violating any compliance-related responsibilities;
    - Establish internal controls and on-going monitoring to determine whether the service provider is complying with the law; and
    - Take prompt action to address fully any problems identified through the monitoring process.

Affiliates should note that the vendor due diligence required for third-party originators and servicers is in addition to the OFAC requirement to check all homeowners and vendors (including third-party originators and servicers) against the Specially Designated Nationals List. *See* Federal Laws Relating to Criminal Financial Activities including Anti-Money Laundering earlier in the Legal Advisory.

- **Electronic Signatures in Global and National Commerce ("E-Sign Act"):** The E-Sign Act is a federal law enacted to facilitate and promote commerce and governmental transactions by validating and authorizing the use of electronic records and electronic signatures. It generally applies to lending transactions that have an *interstate* nexus. *See* 15 U.S.C. §§ 7001 *et seq*. If a lending transaction is limited to one state, then the applicable state law would apply. Most states (other than Illinois, New York, and Washington) have adopted the Uniform Electronic Transactions Act ("UETA"), which is similar to the federal E-Sign Act. UETA and the E-Sign Act generally provide that electronic records and signatures can have the same legal effect as pen and paper records and signatures so long as certain conditions are met. The requirements for sending loan application documents electronically and/or accepting electronic signatures can be onerous. Affiliates are encouraged to carefully review the requirements listed below and evaluate whether such practices are feasible. Due to the uncertainty surrounding the application of UETA and E-Sign Act to promissory notes and mortgages, however, Affiliates should always require live signatures and hard copies of all promissory notes and mortgages. Similarly, while UETA and the E-Sign Act also provide that the retention of records solely in an electronic format is generally sufficient to satisfy a record retention requirement imposed by the law, Affiliates must retain the original promissory note for all lending transactions.

  To send applications and other legally required disclosures (e.g., Adverse Action Notice, Good Faith Estimate) electronically, Affiliates must take the following steps:

  (1) Obtain Written Consumer Consent: Receive prior written (non-electronic) consent from the consumer that the consumer chooses to opt-in to electronic use. The disclosure must meet all the requirements of 15 USC 7001(c)(1), including manner in which electronic documents will be received, right to have record provided in non-electronic form, right to withdraw consent to electronic records and manner in which to do it, whether the consent applies to a specific transaction or other categories of communications, whether a fee will apply to requesting a hard copy also, and hardware and software requirements for access to and retention of electronic records. Affiliates must keep a copy of the signed consent in the applicant's folder.

  (2) Verify Electronic Delivery: After the consumer signs the consent, then the Affiliate must verify that the consumer can, in fact, receive records in this manner. This requirement can be fulfilled by the Affiliate sending an email to the consumer as a test and asking that the consumer confirm it received the e-mail.

  (3) Address Record Retention Concerns: Affiliate must confirm that the *Affiliate* has a policy in place as to how it will retain all electronic records as required by other federal and state laws. In addition, Affiliate must confirm that the *consumer* can retain the documents as required by other federal and state laws. For example, sending an email with an attachment is likely fine. However, sending documents via a portal where access expires in 30 days would

likely violate other record retention laws because the consumer would not have access to such documents after 30 days.

(4) Address Data Security Issues: If any of the documents Affiliates are sending electronically contain a consumer name coupled with SSN or account number (e.g., GFE, TIL), then the documents are very likely subject to state privacy laws. In such cases, the Affiliate must ensure that the document is properly protected against data breech. Sending documents with password protection and the password in a separate email may satisfy these requirements.[18]

For general communications (e.g., scheduling meetings with the applicant), a formal disclosure (as noted above) is not needed. Instead, Affiliates may choose to use an informal letter that informs the applicant that by signing the letter, the applicant agrees the Affiliate can communicate with the applicant at a certain e-mail address. The letter should also mention that the Affiliate does not intend to disclose private information (e.g., SSN) over this mode of communication, but warn the applicant that the Affiliate's e-mail is not necessarily a secure network in case the applicant does send personal information to the Affiliate electronically.

In all circumstances, Affiliates must ensure that the applicant's loan file includes hard copies of all consents and communications.

[18] This concern likely does not arise for required notices under the Equal Credit Opportunity Act (e.g., Notice of Incompleteness, Adverse Action Notice), but will be a concern for RESPA and TILA disclosures such as the HUD-1 and GFE.

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