

## **Affiliate Legal Issues Checklist: Payment for Repairs**

*This checklist is designed to assist in the affiliate's compliance with legal requirements in connection with its pricing and payment for repair products. It does not constitute legal advice. It does not address legal requirements in the selection of homeowners for an affiliate's repair program. The checklist was prepared and is current as of May 5, 2013. Affiliates must check with local counsel for state and local laws that impact their repair programs and pricing and payment for those repairs.*

### ***Do you have all required language in your homeowner agreement?***

- The homeowner agreement<sup>i</sup> includes provisions setting forth:
  - Property description
  - Work to be performed
  - Sweat equity requirements
  - Pricing: total price, payment terms, secured/unsecured, discounts
  - Insurance requirements
  - Warranty
  - Estimated Schedule
  - Right of entry
  - Termination
  - Liability limitation
  - Explanation that Habitat will not engage in or be responsible for mold evaluation or remediation
  - Photo/video release
  - Entire agreement; opportunity to seek legal counsel
  - Signature of all homeowners
- If the homeowner agreement is not signed at the affiliate's office, we have included the rescission statement in the agreement and provided the Notice of Cancellation (see Exhibit A).<sup>ii</sup>
- We have consulted local counsel to ensure that any specific language required by state or local law or regulation is included in the homeowner agreement.

### ***Have you considered state and local licensing requirements?***

- We have obtained all licenses and permits required to provide home improvement or home repair services.

### ***How does your affiliate collect payments for home repairs?***

Each method of collecting payments for home repairs comes with its own set of considerations. Please use the following pages to work through the legal considerations that your particular payment method implicates.

### ***Additional Considerations***

- Have you considered how you would seek to enforce the promissory note, e.g., how to institute a legal action; whether a small claims action would be applicable?
- We have checked with our local counsel to identify any local licensing or other requirements for collection of our debts, and complied with all such requirements in attempting to collect payment in the event of default.<sup>iii</sup>
- Will you offer an automatic withdraw from the homeowner's bank account?<sup>iv</sup> If yes, then:
  - We have obtained written authorization for automatic withdrawal from the homeowner's bank account that is signed or similarly authenticated by the homeowner, and we have provided the homeowner with a copy of the authorization. 12 C.F.R. § 1005.10(b).
  - We have complied with notice requirements if the preauthorized electronic fund transfer will vary in amount from the previous transfer under the same authorization or from the preauthorized amount. 12 C.F.R. § 1005.10(d).
  - We have complied with the NACHA Operating Rules in the establishment and administration of the automatic payment plan.

### **Payment Approach #1: Prepayment (in full or in part)**

#### **Homeowners put sufficient money into a segregated account before the repair work begins.**

- We have signed a homeowner agreement with all requisite provisions (see the “homeowner agreement” section above, and sample agreement available on my.habitat).
- We have considered state and local limitations on the amount of money that can be collected upfront for home improvements or home repairs and confirmed that this approach is permitted.
- We have established a segregated account to hold the payments apart from other funds that the affiliate controls.
  - We are treating the segregated funds as if held in escrow. In some states, an escrow account itself may be required; if so, check with local counsel to determine if a state or local license is required to administer an escrow account.

## **Payment Approach #2: Lump Sum Payment**

**Homeowners pay in a lump sum as soon as the repair work is complete.**

- We have signed a homeowner agreement with all requisite provisions (see the “homeowner agreement” section above, and sample agreement available on my.habitat).
- We have provided all required disclosures, including, but not limited to, information regarding mechanics liens.<sup>v</sup>
- We have prepared an invoice, with copies for the homeowner and affiliates, that includes a description of the work performed, the agreed upon price, the date completed and the due date for the payment.

### Payment Approach #3: Unsecured Promissory Note

**Homeowners pay for home repairs by paying back the affiliate over time, without requiring any collateral.**

- We have signed a homeowner agreement with all requisite provisions (see the “homeowner agreement” section above (and sample agreement available on my.habitat)).
- We have signed a promissory note, which references the homeowner agreement and sets forth the terms of repayment and the right of the affiliate to immediately collect (including costs of collection) if there is a default in repayment.<sup>vi</sup>
  - All the borrowers have signed the note.<sup>vii</sup>
  - If the promissory note includes late fees, the fees do not exceed the amount permitted by applicable law, and the promissory note does not allow “pyramiding” of late fees (charging a late fee when the only delinquency is attributable to a late fee assessed on an earlier installment).
  - The promissory note includes all specific language required by applicable law, such as the disclosure required by the FTC’s Holder Rule related to the preservation of consumers’ claims and defenses.<sup>viii</sup>
- We have obtained any state licenses that apply to businesses making consumer or retail loans (unless an exemption applies for nonprofit lenders).
- We have provided all notices and disclosures, in writing, required by federal, state and local laws regarding consumer loans, such as:
  - Truth in Lending Disclosure - If a finance charge will be imposed or the loan is repayable in more than 4 installments. See 12 C.F.R. § 1026.17.
  - Adverse Action Notice - Notification of action taken on the borrower’s application to finance the home repairs has been provided within 30 days after receipt of the completed application, within 30 days after taking adverse action on an incomplete application or within 90 days after notifying the applicant of a counteroffer if the applicant does not expressly accept or use the credit offered. 12 C.F.R. § 1002.9(a). Adverse action notices must comply with the Equal Credit Opportunity Act and Regulation B requirements. See 12 C.F.R. § 1002.9.
- We have provided all notices, in writing, required by federal, state and local laws regarding loans made as part of the repair, improvement or construction of real property.

## Payment Approach #4: Secured Promissory Note

### Homeowners pay for home repairs by paying back the affiliate over time and providing collateral for that loan.

- We have signed a homeowner agreement with all requisite provisions (see the “homeowner agreement” section above, and sample agreement available on my.habitat).
- We have signed a promissory note, which references the homeowner agreement and sets forth the terms of repayment and the right of the affiliate to immediately collect (including costs of collection) if there is a default in repayment.
  - All the borrowers have signed the note.<sup>ix</sup>
  - If the promissory note includes late fees, the fees do not exceed the amount permitted by applicable law, and the promissory note does not allow “pyramiding” of late fees (charging a late fee when the only delinquency is attributable to a late fee assessed on an earlier installment).
  - The promissory note includes all specific language required by applicable law, such as the disclosure required by the FTC’s Holder Rule related to the preservation of consumers’ claims and defenses.<sup>x</sup>
- We have obtained any state licenses that apply to businesses making consumer or retail loans (unless an exemption applies for nonprofit lenders).
- We have provided all notices and disclosures, in writing, required by federal, state and local laws regarding consumer loans.
  - Truth in Lending Disclosure -- If a finance charge will be imposed or the loan is repayable in more than 4 installments. See 12 C.F.R. § 1026.17.
  - Truth in Lending Right of Rescission -- If a finance charge will be imposed or the loan is repayable in more than 4 installments and a security interest will be retained in the consumer’s principal dwelling, a Notice of Right to Rescind, allowing the borrower to rescind the loan by midnight three business days after the extension of credit, in accordance with the Truth in Lending Act and Regulation Z must be provided. 12 C.F.R. § 1026.23.
  - Adverse Action Notice -- Notification of action taken on the borrower’s application to finance the home repairs has been provided within 30 days after receipt of the completed application, within 30 days after taking adverse action on an incomplete application or within 90 days after notifying the applicant of a counteroffer if the applicant does not expressly accept or use the credit offered. 12 C.F.R. § 1002.9(a). Adverse action notices comply with the Equal Credit Opportunity Act and Regulation B requirements. See 12 C.F.R. § 1002.9.
- We have provided all notices, in writing, required by federal, state and local laws regarding loans made as part of the repair, improvement or construction of real property.
- We have provided all notices and disclosures, in writing, required by federal, state and local laws that we would normally use in a closing, such as Good Faith Estimate, Privacy, and RESPA Transfer of Service. (See MPAR home page on my.habitat for more information, <http://my.habitat.org/kc/home/mpar>.)

Exhibit A – Cooling Off Period Notice

If subject to the federal Cooling Off Period Rule, affiliate must furnish the homeowner with both of the following items at the time of the signing of the homeowner agreement:

- (1) A fully completed receipt or copy of the homeowner agreement, in the same language as the language principally used in the oral sales presentation. The agreement must show the date of the transaction, the name and address of the seller, and in immediate proximity to the space reserved in the contract for the signature of the buyer or on the front page of the receipt if a contract is not used and in bold face type of a minimum size of 10 points, a statement in substantially the following form:

**“You, the buyer, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached notice of cancellation form for an explanation of this right.”**

- (2) A fully completed Notice of Cancellation, in duplicate, in at least 10 point bold face type, in the same language as the contract:

**Notice of Cancellation**

[enter date of transaction]

\_\_\_\_\_  
(Date)

**You may CANCEL this transaction, without any Penalty or Obligation, within THREE BUSINESS DAYS from the above date.**

**If you cancel, any property traded in, any payments made by you under the contract or sale, and any negotiable instrument executed by you will be returned within TEN BUSINESS DAYS following receipt by the seller of your cancellation notice, and any security interest arising out of the transaction will be cancelled.**

**If you cancel, you must make available to the seller at your residence, in substantially as good condition as when received, any goods delivered to you under this contract or sale, or you may, if you wish, comply with the instructions of the seller regarding the return shipment of the goods at the seller's expense and risk.**

**If you do make the goods available to the seller and the seller does not pick them up within 20 days of the date of your Notice of Cancellation, you may retain or dispose of the goods without any further obligation. If you fail to make the goods available to the seller, or if you agree to return the goods to the seller and fail to do so, then you remain liable for performance of all obligations under the contract.**

**To cancel this transaction, mail or deliver a signed and dated copy of this Cancellation Notice or any other written notice, or send a telegram, to [Name of seller], at [address of seller's place of business] NOT LATER THAN MIDNIGHT OF [date].**

**I HEREBY CANCEL THIS TRANSACTION.**

(Date) \_\_\_\_\_

(Buyer's signature) \_\_\_\_\_

## Endnotes

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<sup>i</sup> For a sample homeowner agreement, see <http://my.habitat.org/kc/download-detail/3e1fd/Sample-Homeowner-Agreement-for-Owner-Occupied-Repairs>.

<sup>ii</sup> This federal “Cooling-Off Rule” may apply if you solicit a sale of goods or services (including in response to the buyer’s invitation for the solicitation) and the buyer’s agreement to purchase the services is entered into at a location other than your place of business. See 16 C.F.R. § 429.0 *et seq.* Under this Rule, you must provide the buyer with a three-day right of rescission, unless an exception applies. Exceptions include (among others) (i) if the agreement is made pursuant to prior negotiations between you and the buyer at your place of business or (ii) if the services are needed to meet a bona fide personal emergency of the buyer, as evidenced by a separate dated and signed personal statement in the buyer’s handwriting describing the situation needing immediate remedy and expressly acknowledging and waiving the right to cancel the sale within 3 business days. If your home repair services are subject to this Rule, the homeowner agreement must contain specific language informing the buyer of his or her right to cancel the agreement (see Exhibit A (from 16 C.F.R. § 429.1) for the required language).

<sup>iii</sup> The federal Fair Debt Collection Practices Act applies only in connection with the collection of debts due to a third party. 15 U.S.C. § 1692a(6). State or local law may require licensing and/or set forth prohibitions or requirements in connection with collecting your own debt. Note that if the borrower defaults, you may need to seek a judgment against the borrower in civil court and then seek to collect on that judgment.

<sup>iv</sup> A consumer may authorize repayment through preauthorized electronic fund transfers, but you may not condition the extension of credit on such authorization (i.e., the consumer must have the option to repay by other methods). 12 C.F.R. § 1005.10(e).

<sup>v</sup> State law may allow you to place a mechanics lien on the homeowner’s property for unpaid amounts. After you record a mechanics lien on the property, you may initiate an action in civil court to foreclose the lien and collect payment. Note that once the repairs are completed, state law may impose a short deadline (e.g., 1 year) for placing a lien and/or initiating an action based on a mechanics lien on the property.

<sup>vi</sup> Pursuant to the FTC’s Credit Practices Rule, the promissory note cannot contain: (1) a confession of judgment, warrant of attorney or waiver of the right to notice and the opportunity to be heard in the event of suit; (2) an executor waiver or limitation of exemption from attachment, execution or other process on the consumer’s property; (3) an assignment of wages (unless revocable by the debtor, pursuant to a payroll deduction/preauthorized payment plan or applicable to only to wages already earned); or (4) a nonpossessory security interest in household goods. 16 C.F.R. § 441.2. Informal staff opinion letters from 1985 indicated that the rule does not apply to nonprofit organizations, but we have been unable to confirm that the opinion letters are still binding. For a sample promissory note, see <http://my.habitat.org/kc/download-detail/3e43f/Template-Promissory-Note-for-Homeowner-Occupied-Programs>.

<sup>vii</sup> If a cosigner is involved, the Notice to Cosigner disclosure required by the Credit Practices Rule (see endnote v) must be provided. 16 C.F.R. § 444.3.

<sup>viii</sup> See 16 C.F.R. § 433.2 (consumer credit contract states in at least ten point, bold face, type: “NOTICE ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.”)

<sup>ix</sup> See endnote vi.

<sup>x</sup> See endnote vii.