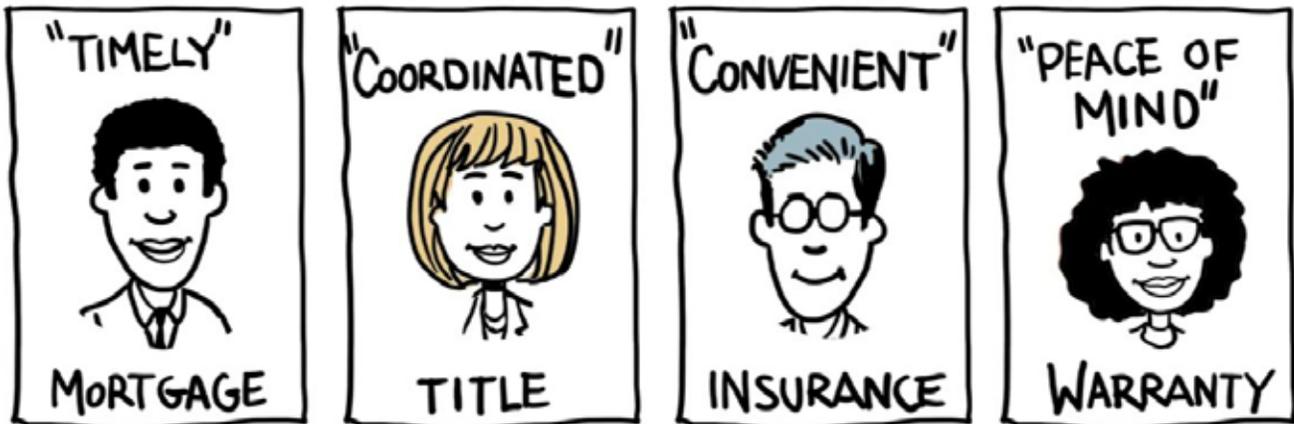


When Marketing Services Agreements Make Sense

BY MARK MEYER



Mark Meyer

Settlement service providers must find cost-effective ways to market their products and services to home buyers in order to compete and survive.

SETTLEMENT SERVICE PROVIDERS MUST MARKET TO HOME BUYERS

The home purchase market is obviously the sought-after business channel for residential settlement service providers. It offers an ongoing flow of transaction opportunities for those who work in a complementary way with their real estate broker and builder associates and perform well for their buyers. Mortgage lenders, title agencies, and other settlement service providers must market their services to grow and prosper. While some companies market primarily through third-party media channels (e.g., newspaper, magazine, radio, television), others have found that advertising through Marketing Services Agreements (MSAs) with well-regarded business associates, surrounded by a

community of prospective buyers who need services, can be a very cost-effective advertising approach. Importantly, when a settlement provider can accomplish critical functions, like marketing, in a more productive and efficient manner, home buyers may benefit from more attractively priced services.

MARKETING SERVICES AGREEMENTS CAN LEAD TO A BETTER HOME BUYING PROCESS

Strategic relationships and services agreements between settlement service providers can be a catalyst for designing and implementing a better home buying process that places the buyer first. Working together, the providers can coordinate and communicate to make the experience more convenient, predictable, smooth, and timely for the home buyer ▶

and all other participants to the home purchase. This better process and home buyer experience can be a differentiator for the settlement provider in marketing to home buyers. The purpose of an MSA is to brand and differentiate who the settlement provider is and what it does, among home buyers, agents and sales people, so it can effectively compete for the business.

YES, MARKETING SERVICES AGREEMENTS CAN STILL BE COMPLIANT

Despite plenty of regulatory scrutiny by the Consumer Financial Protection Bureau (CFPB) and others, Marketing Services Agreements can still be structured and managed to be compliant with the Real Estate Settlement Procedures Act (RESPA), which prohibits the giving or receiving of a thing of value in exchange for the referral of a settlement service. RESPA Section 8(c) (2) allows payment for actual, necessary and distinct services provided, as long as the payment does not exceed the value of the services and is not based upon the amount or volume of referrals. However, HUD weighed in as part of its 2010 interpretive comments on MSAs to disallow “direct sales pitches” to particular customers. In addition, the CFPB has commented in its consent orders and related bulletins that 1) there can be no agreement or understanding regarding referrals, 2) there is a potential the contract itself may be considered a thing of value, 3) a provider cannot pay for endorsements, 4) the bulk of the marketing should not be directed to other settlement providers with the intent of establishing additional marketing services agreements, and 5) home buyer discounts should not be selectively provided.

MSAs must also be attentive to the Unfair, Deceptive or Abusive Acts and Practices Act (UDAAP), the Truth in Lending Act (TILA), and all other federal and state requirements.

INDUSTRY BEST PRACTICES FOR MARKETING SERVICES AGREEMENT COMPLIANCE

As a result of these regulatory interpretations, settlement service providers are responding with

“Best Practices” to successfully structure and manage MSAs:

MSA document: 1) State that there is no agreement or understanding regarding referrals, 2) Avoid “exclusive” and “preferred” language, 3) Do not pay for “direct sales pitches” to particular customers, 4) Avoid paying for “access”.

Marketing services: 1) Use primarily “public facing” advertising. Examples include a) signage at sales offices, property listings and other locations generally available to the public, b) general structured email and / or direct mail campaigns, containing general information about the service provider, to a large number of customers and prospects (not a “direct sales pitch” to a particular customer), c) website banner ads and / or links and social media exposure, d) a video loop or kiosk, with information about the service provider, in locations available to the public. 2) Treat “internal” advertising (e.g., a real estate broker marketing the service provider to its agents) secondary in importance and 3) Do not pursue MSAs with individual real estate agents.

MSA Disclosure: 1) Inform home buyers of the marketing relationship, of the fact that a fee is being paid, and that home buyers are free to choose other settlement service providers. Examples include hanging of a settlement provider disclosure at marketer’s offices, and / or including the disclosure as an addendum to a real estate broker’s buyer representation agreement. 2) Label settlement provider ads as “Paid Advertising” on marketer web sites and other locations, as appropriate.

MSA program administration, policies

and procedures: 1) Keep management and administration of MSAs in a corporate compliance or legal group, 2) Keep analyses of marketing results and business generated in a separate company function, 3) Document MSA policies and procedures, 4) Train employees regarding RESPA, 5) Obtain an independent valuation of services to be performed for all MSAs, 6) Set flat, conservative marketing fees, below the value of services to be performed. This allows cushion in case there is a ►

variation in actual service activities provided or a difference of opinion in the value of such services, and to help demonstrate that there is no agreement or understanding regarding referrals, 7) Implement a disciplined, back end services verification and compensation process, and 8) Dissolve MSAs with marketers not providing sufficient proof of services on a timely basis.

Legal and compliance support: Utilize knowledgeable compliance experts and legal counsel to help assure proper implementation.

IN SUMMARY

Settlement service providers must find cost-effective ways to market their products and services to home buyers in order to compete and survive. The real estate environment is one of the most fertile grounds for marketing to home buyers in need of related services. Of course, MSAs must be properly structured, valued, verified, compensated and managed to be compliant with RESPA and

attentive to the CFPB's latest interpretations. Importantly, a compliant, well managed MSA can be a catalyst for creating a better home buying process among complementary providers in the industry. It can also be an excellent way to brand and differentiate a settlement provider's services to effectively compete for purchase business. And, properly structured relationships between complementary service providers to a home purchase can be one of the most important contributors to a buyer's positive experience. That, of course, makes the most sense of all.

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