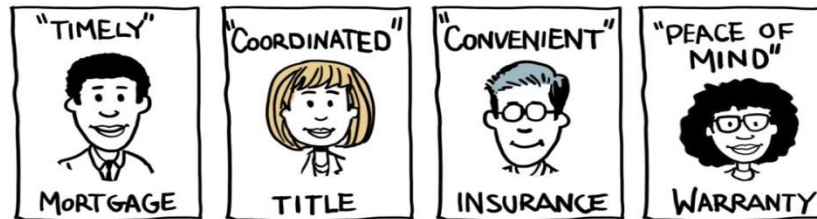


National Association of REALTORS®  
2016 REALTORS® Conference & Expo

# MSAs, RESPA Compliance and Impact of PHH Decision



Mark L Meyer, Founder and CEO, MLinc Solutions

# Session Goal, Objectives and Takeaways

- Goal: Provide information / tools to assure MSAs and similar agreements are consumer conscious and RESPA compliant.
- Objectives:
  - ✓ Learn how MSAs and other business relationships can be used to create a better home buyer experience.
  - ✓ Learn how establishing a reasonable value for services and verifying that services are delivered is critical to justify payment under RESPA.
  - ✓ Identify the key elements to determine whether your current arrangements are RESPA compliant.

# Session Goal, Objectives and Takeaways

- Takeaways – Attendees will be able to:
  - ✓ Collaborate with providers to create a better home buying experience.
  - ✓ Identify and correct compliance problems with current arrangements.
  - ✓ Articulate a compliant narrative to create, execute and describe agreements.

# Presentation Summary

- RESPA Compliance Basics
- What an MSA is and What it is Not
- Previous CFPB Actions / Position
- Impact of PHH DC Circuit Court Decision
- Industry Response
- Services Agreements Decision Tree

# Presentation Summary

- A Better Home Buying Process
- Key Components of Compliant MSAs / Other Agreements
- Defending MSAs / Other Agreements with Regulators
- Critical Action Items
- Q &A

# RESPA Compliance Basics



- Everyone knows RESPA Section 8 (a) makes it illegal to give or receive:
  - ✓ A thing of value pursuant to an agreement or understanding to refer settlement services, in connection with a federally related mortgage loan
- CFPB, other regulators and private litigants are enforcing Section 8 (a) violations.

# RESPA Compliance Basics



- There may also be state law implications.
- Section 8(c) (2) of RESPA, however, expressly permits, among others, payments for goods provided and / or services performed:
  - ✓ Goods/services must be actual, necessary and distinct.
  - ✓ Payment must be commensurate with the value of goods/service.
  - ✓ Payment cannot be based on amount or volume of referrals.

# What an MSA is and What it is Not



- An MSA is just another advertising medium.
- MSAs bring branding / differentiation to compete for business.
- Payments are based on the cost of marketing services and impressions....NOT Referrals.
- Referrals are fine...you just can't be paid for them.
- MSAs are a catalyst for creating a better home buying process.
- MSAs can be cost-effective...and benefits can be shared with Home Buyers.
- MSAs must be compliant with RESPA.



## Previous CFPB Actions / Position



- The CFPB is skeptical of MSAs and other Services Agreements articulated in various enforcement actions, including Lighthouse Title, PHH and its MSA Bulletin (Compliance Memo 2015-5):
  - ✓ Believes these relationships are frequently illegal referral agreements
  - ✓ Believes compliance is difficult given incentives to violate
- The CFPB has previously stated that in order to be compliant:
  - ✓ Not only must MSAs meet RESPA Section 8(c) (2) requirements regarding payments for goods / services actually provided, but also, there can be no agreement or understanding regarding referrals (the CFPB has presumed this and you must disprove the negative).

## Previous CFPB Actions / Position



- Thus, purchasers of services must be prepared to demonstrate:
  - ✓ Payments do not exceed reasonable value of services (without regard to referrals)
  - ✓ Purchased services are actually delivered, and
  - ✓ A unique narrative for why the purchaser is in that marketing relationship, e.g., to brand, differentiate and compete

## Previous CFPB Actions / Position



- Other developments indicating CFPB concerns regarding MSAs and Services Agreements and highlighting importance of attention to compliance details:
  - ✓ Endorsements = Referrals, e.g., Don't pay to be a "Preferred" Lender
  - ✓ A contract itself may be considered a thing of value
  - ✓ Informal concerns about marketing to other settlement providers
  - ✓ Concerns about selective Consumer Discounts raised by recent Consent Order

# Impact of PHH DC Circuit Court Decision

- Besides vindicating PHH, the Decision addressed several issues which are instructive to the industry:
  - ✓ Structure of single director CFPB found unconstitutional
  - ✓ PHH's right to due process was violated because CFPB sought to punish them for something that the law clearly allowed. RESPA Section 8(c) (2) DOES NOT PROHIBIT proper payment for services.
  - ✓ CFPB's position that there can be no understanding or agreement regarding referrals was challenged and overruled.
  - ✓ The CFPB cannot ignore the applicable statute of limitations.
  - ✓ The CFPB is likely to appeal.

# Impact of PHH DC Circuit Court Decision

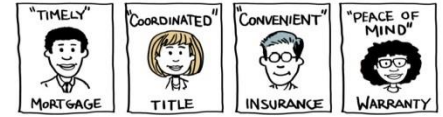
- MSAs / other services agreements should be okay as long as real services are performed at a reasonable fair market value – the industry's position all along.

# Industry Response



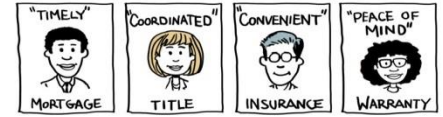
- Document and Structure:
  - ✓ State that there is no agreement or understanding regarding **amount or volume** of referrals.
  - ✓ Avoid “Exclusive” and “Preferred” language.
  - ✓ Avoid “Direct Sales Pitches” to particular customers.
  - ✓ Avoid paying for “Access”.
- MSA Advertising Services:
  - ✓ Focus primarily on public facing advertising.
  - ✓ Internal advertising is secondary.
  - ✓ Don’t form MSAs with individual agents.

# Industry Response



- Disclosure
  - ✓ Examples – Poster at offices and / or Buyer Representation Agreement from Purchaser, informing home buyers of agreement, that a fee is paid, and home buyers are free to choose other providers

# Industry Response



- Program Administration, Policies and Procedures:
  - ✓ Services Agreements are managed and administered by Corporate Compliance / Legal function.
  - ✓ Business / financial analyses of success / results are handled by a separate function.
  - ✓ There are formal, documented Policies and Procedures in place.
  - ✓ RESPA training is conducted for all applicable Agents, Loan Officers and Employees.



# Industry Response



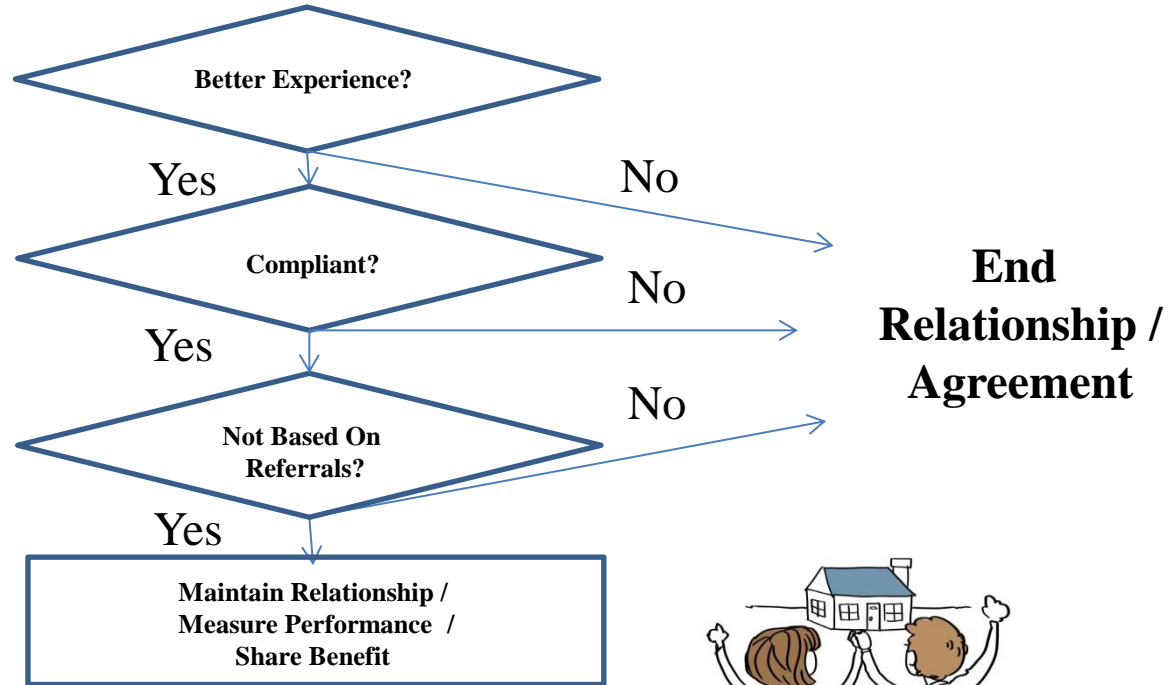
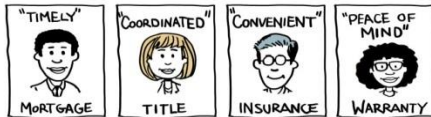
- Program Administration, Policies and Procedures:
  - ✓ External Independent valuations are performed on all Services Agreements.
  - ✓ Fees are set conservatively, below the market value of services to be provided.
  - ✓ More formalized and disciplined back end internal and external verification and compensation processes are being implemented.



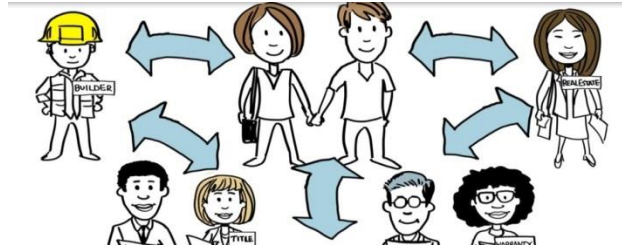
# Industry Response

- There is growth in use of other Services Agreements besides MSAs:
  - ✓ Web Site Advertising
    - Internet
    - Social Media
    - Intranet
    - Third-Party Web platform for Co-Marketing and Lead Generation
  - ✓ External Event Sponsorship
  - ✓ Other Advertising Services
  - ✓ Office Leases

# Services Agreements Decision Tree

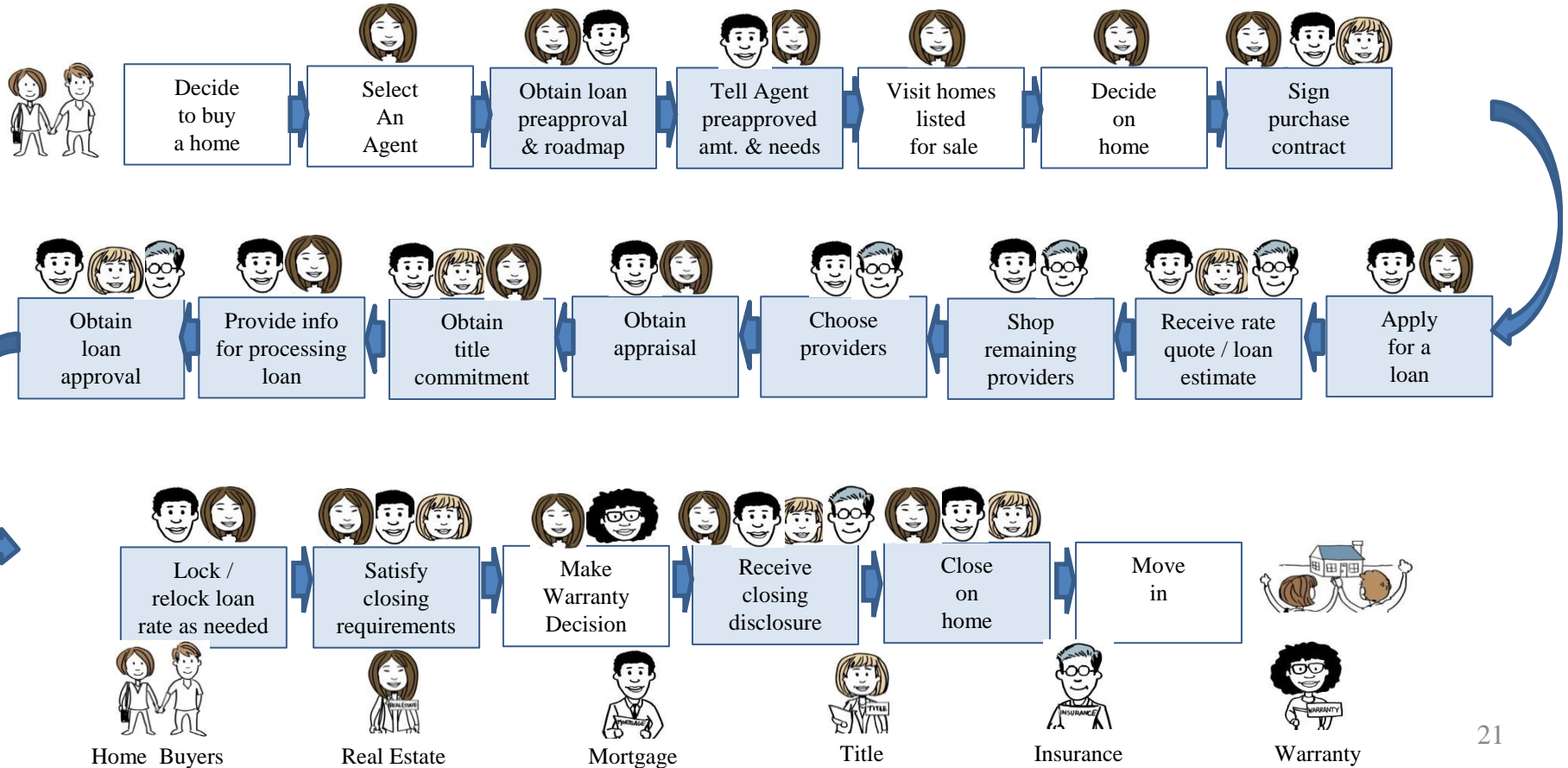


# Strategic Relationships Offer Advantages

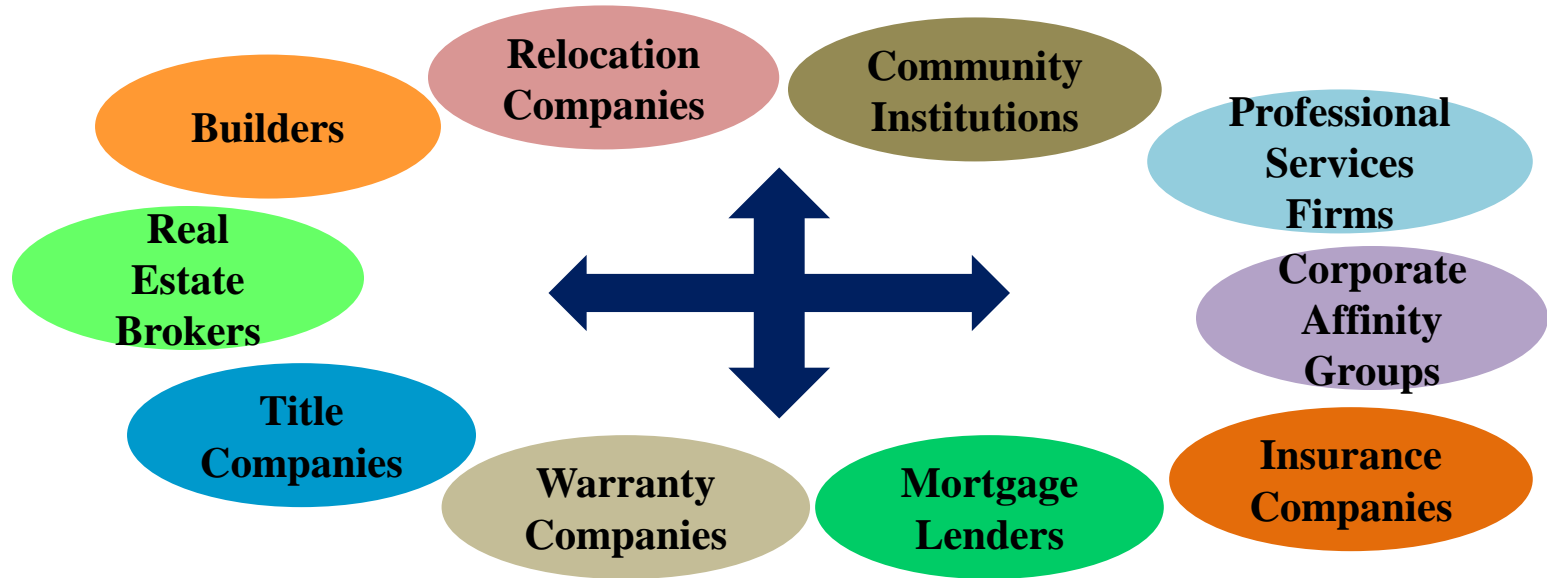


- Predefined process
- More direct communication
- Designed for convenience
- Coordinated services among providers
- Accurate and timely disclosures for TRID compliance
- Potential for lower-cost services and lower-priced transactions
- Integrated, streamlined and timely closings
- With success, more purchase business opportunities

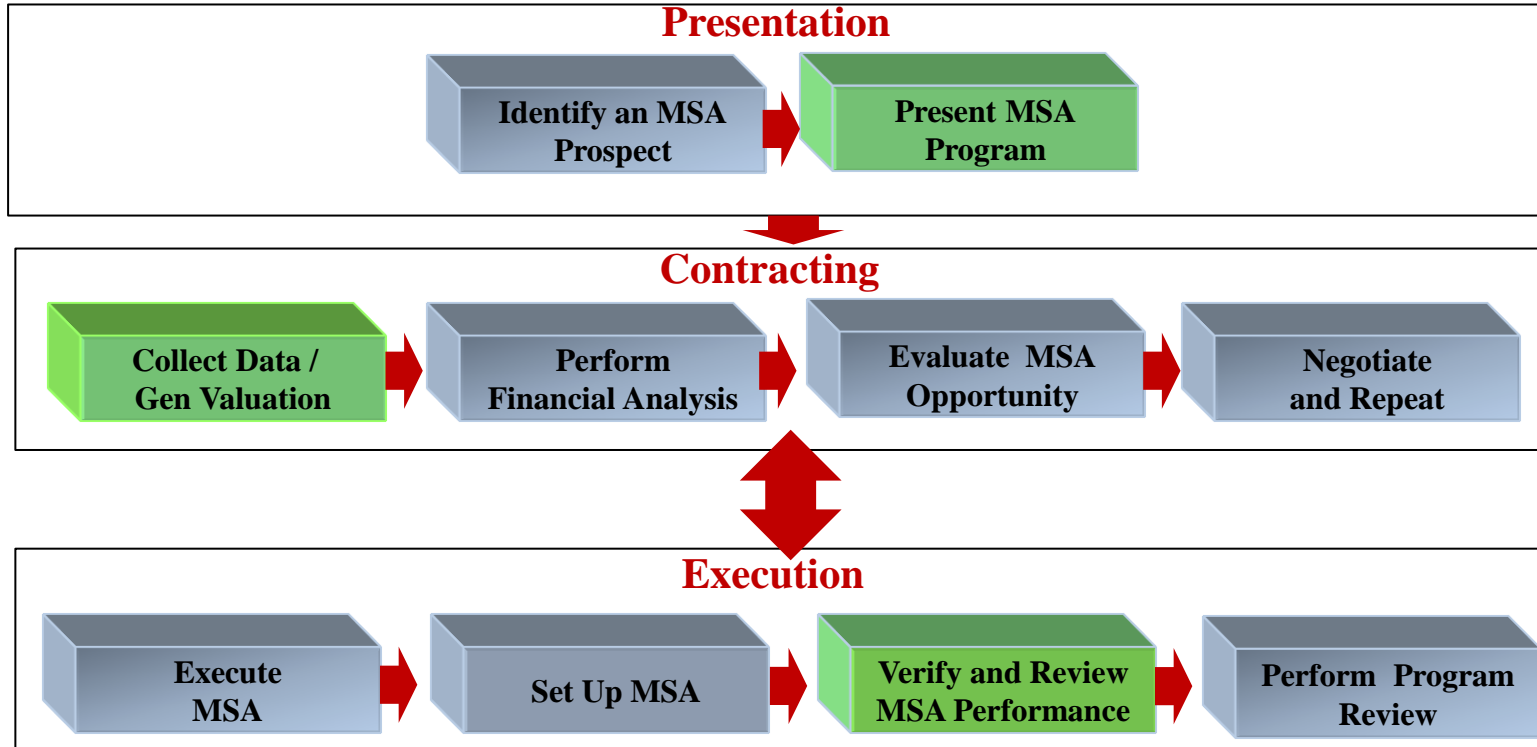
# A Better Home Buying Process



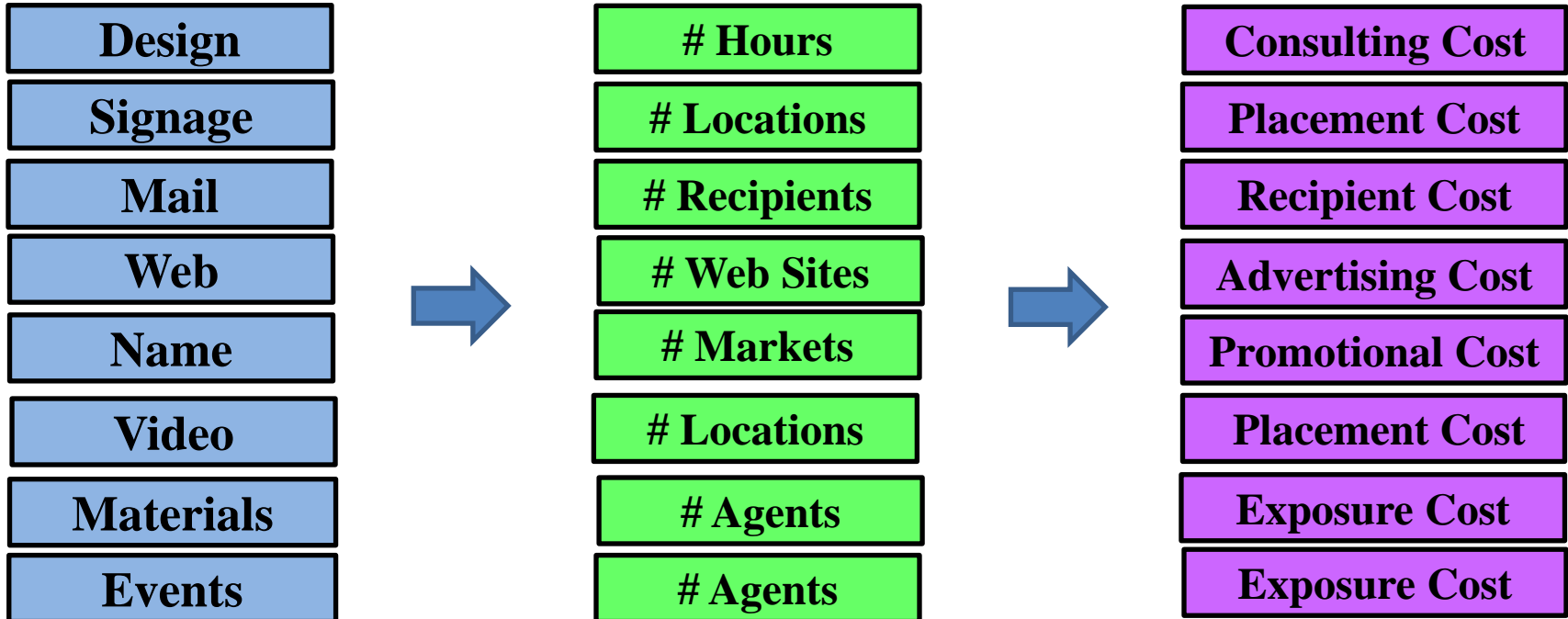
# Potential MSA Relationships



# MSA Policies and Procedures

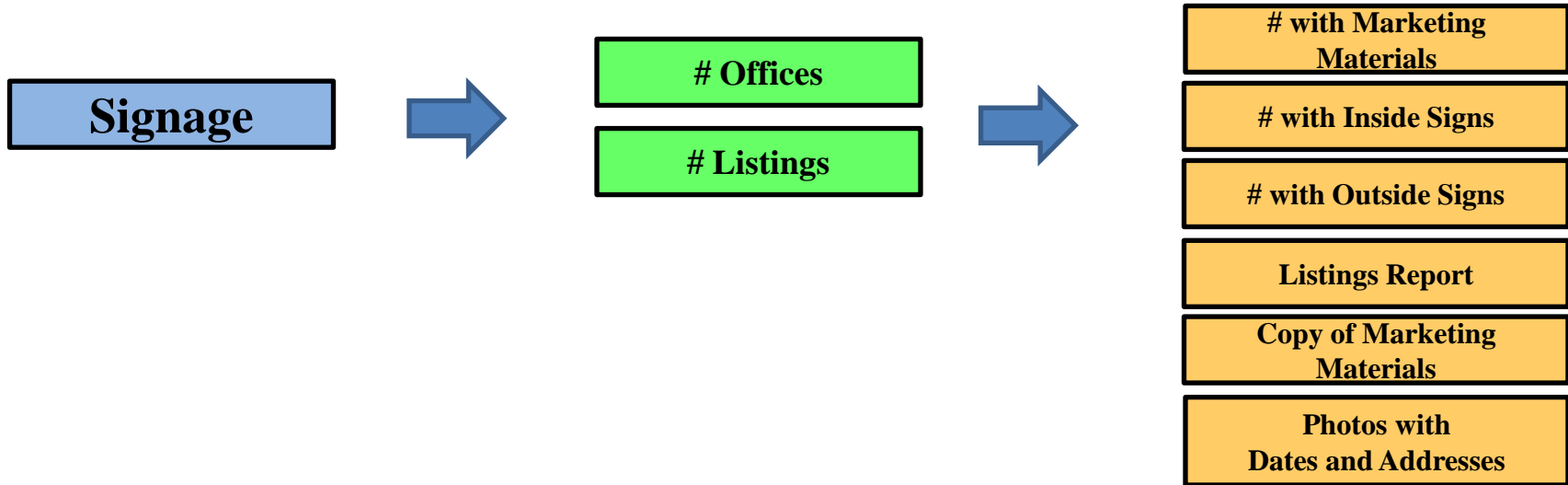


# MSA Services and Valuation Components





# Verification Documentation *Examples*



# Signage Outside Listings – Verification Report

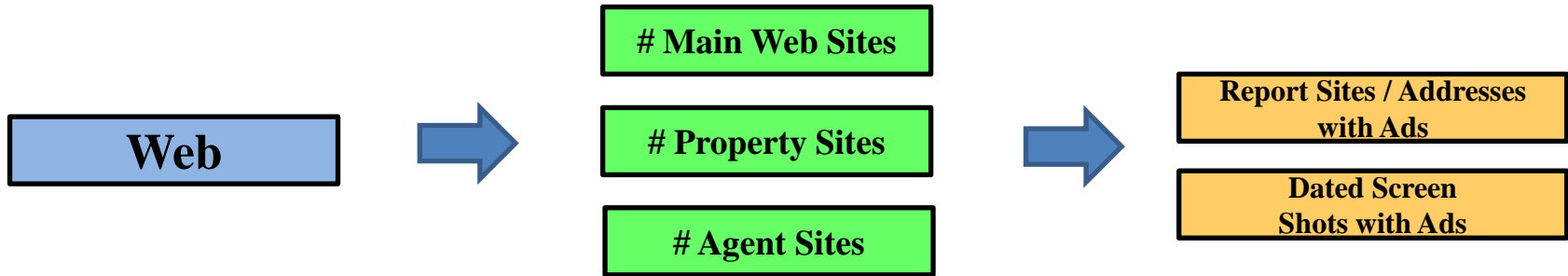
## (For Illustration Purposes Only)

Documentation Requirements	Data Collected	MSA Value	Partner Actual	Verified Actuals	Status	ComplyMSA Comments
	# of listings with BMHL outside signage that is generally visible from the street	35	35	30	Partial	MSA requires yard signs marketing BMHL to be displayed at 35 listings. 30 listings were reported in the provided Broker Listing Report.
B4a - Electronic copy of Broker listing report indicating the properties that display BMHL outside signage by property	<b>ATTACH: Dated and titled Broker listings report indicating properties with BMHL outside signage (yard signs)</b>	Yes	Yes	Yes	Complete	
B4b - Photos of listing yard signs showing BMHL; signs must be generally visible from the street	<b>ATTACH: Dated photos of listing yard signs (RIDER) showing BMHL</b>	4	4	3	Partial	1 uploaded yard sign photo was not acceptable due to missing address and date.

# Signage Outside Listing (Photo) – No Date/Address



# Verification Components



# Lender Displayed on Property Website Verification Report *(For Illustration Purposes Only)*

Documentation Requirements	Data Collected	MSA Value	Partner Actual	Verified Actuals	Status	ComplyMSA Comments
Report the number of property-specific web sites that refer or link to BMHL; property websites do not include "listing" pages on a broker or aggregator site	# of property-specific web sites that market BMHL	20	20	20	Complete	
E3a - Electronic copy of Broker report indicating the individual property websites that display BMHL information or links	<b>ATTACH: Dated and titled Broker report indicating individual property websites with BMHL information or links</b>	Yes	Yes	Yes	Complete	
E3b - Screenshots of property-specific web site showing BMHL, property address, web site address and date; not to include "listing" pages on a broker or aggregator site	<b>ATTACH: Dated screen shots of property-specific web sites; needs to show date during activity month, web site address, property address, and BMHL</b>	2	2	2	Complete	

# Lender Displayed on Property Website (Screenshot)

<https://www.1111luckylanedallas.com>



**FOR SALE**

**Price: \$234 000** **1111 Lucky Lane Dallas, TX 75229**  
- 2 Bedrooms  
- 3 Bathrooms  
- 4000 Squares Feet  
Short description of your property. You can include other features that were not listed above (Location, garage, Air conditioning, Roof, City views, ...)

**Price: \$234 000** **CONDO, ORLANDO**  
- 2 Bedrooms  
- 3 Bathrooms  
- 4000 Squares Feet  
Short description of your property. You can include other features that were not listed above (Location, garage, Air conditioning, Roof, City views, ...)

**Price: \$234 000** **APARTMENT, JACKSONVILLE**  
- 2 Bedrooms  
- 3 Bathrooms  
- 4000 Squares Feet  
Short description of your property. You can include other features that were not listed above (Location, garage, Air conditioning, Roof, City views, ...)

Jan 1, 2015, 7:15PM **Quality Real Estate** **Best Mortgage Home Loans**



## Defending MSAs with Regulators

- Use the Proper Narrative.
- Describe how an MSA is used as a catalyst for creating a better home buying experience for consumers and all other parties to a home purchase.
- Survey home buyer satisfaction and show metrics of how positively home buyers view the process.
- Discuss Agreements, Services, Disclosures, Policies and Procedures, RESPA Training, etc. as appropriate.
- Provide Valuation, Verification and Compensation Documentation for specific MSAs, as requested.

# Critical Action Items



- **Contract to provide legitimate services for providers.**
- **Use relationships as a catalyst for creating better processes.**
- **Adopt a compliant narrative describing the relationships.**
- **Maintain corporate control over your services program.**



# Critical Action Items



- **Value services and negotiate fees appropriately:**
  - ✓ Fees should be based upon cost of services / NOT agreement or understanding regarding **amount or volume** of referrals.
  - ✓ Rely on **independent** valuation to reduce conflict of interest.
  - ✓ Set fees conservatively to mitigate risk in the event services are not provided exactly as expected.

# Critical Action Items



- **Verify services are performed and set payments accordingly:**
  - ✓ Implement a robust system to manage relationships and execution.
  - ✓ Obtain confirmation that services are performed.
  - ✓ Collect data and documentation to verify services are provided.
  - ✓ Value actual services performed and verified for the month and agreement to date.
  - ✓ Set payments, in arrears, considering the value of actual verified monthly and agreement to date service activity.

# Critical Action Items



- **Disclose relationships to Consumers.**
- **Train all applicable employees in MSAs and other similar arrangements regarding RESPA compliance.**

# Q & A



This presentation is for informational purposes and should not be relied upon as general or particularized legal advice. The unique facts or circumstances of any strategic relationships or agreement between settlement service providers or others should be discussed with legal counsel to determine its compliance with all applicable laws.

# Mark L Meyer

- Mark L Meyer is Founder and CEO of MLinc Solutions (“MLinc”), a nationwide provider of expertise, insight and innovative solutions to the settlement services industry and a leader in bringing together companies to form complementary business arrangements that benefit consumers and all other parties to a real estate transaction.
- MLinc’s Affiliated Business Arrangement (“ABA”) and Services Agreements solutions and related transformative offerings have brought hundreds of companies the independent expertise and diligence needed to confidently forge thousands of mutually-beneficial business relationships that are compliant with the Real Estate Settlement Procedures Act (“RESPA”). Specifically, the company’s **ABA and Services Agreements Solutions** provide tools, templates and videos for helping clients evaluate, sell and set up strategic relationships. And, MLinc’s industry-leading **ComplyMSA<sub>TM</sub>, ComplyWSA<sub>TM</sub>, ComplyEvents<sub>TM</sub>, and ComplyOffice<sub>TM</sub> Offerings** help companies value and verify services provided by business associates, including marketing activities, web advertising, sponsored events, and office leases, to enhance RESPA compliance.
- Mark has been a guest editorial contributor to Mortgage Banking Magazine, Real Estate Magazine, RESPAnews.com, RESPRO Magazine and The MReport, and is a requested lecturer and panel participant at settlement service industry forums.

[www.mlincolutions.com](http://www.mlincolutions.com)

[mark@mlincolutions.com](mailto:mark@mlincolutions.com)

Office: 214-553-1002