



Uniting Providers Across the Industry



# *So, after the PHH Decision, does anything go? NOT SO FAST*



*Mark L Meyer*  
*Founder and CEO*  
*MLinc Solutions*

**MLinc** Solutions  
A better way to work

*Brian Levy*  
*Of Counsel*  
*Katten & Temple, LLP*



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# Presentation Summary

- Quick Review of RESPA Section 8(c)
- The PHH Decision and En Banc Appeal
- What Does the Decision Mean?
- Services Agreements – Catalyst for a Better Process?
- Advertising - Proactive Practices
- Office Sublease - Proactive Practices
- Responding to Regulatory Exams
- Other Proactive Practices
- RESPA Compliance Management Program



# Quick Review of RESPA Section 8(c)

- **Expressly permits some payments:**
  - Employer/Employee
  - Secondary Market Transactions
  - Affiliated Business Arrangements
  - **AND.....**





# Quick Review of RESPA Section 8(c)

- Section 8(c)(2) allows payments for services rendered or goods or facilities actually provided:

**“Nothing** in this section [Section 8] shall be construed as prohibiting... (2) the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed...”

12 USC § 2607(c)(2)



# Why is Section 8(c)(2) so Important

- It is the legal basis for many common Settlement Service Provider relationships involving payment to referral sources
  - MSAs
  - Office Subleases / Desk Rentals
  - Co-Marketing / Joint Advertising (Zillow, Commissions Inc., Boomtown, etc.)
  - Lead purchasing /sharing
  - Sponsorships
  - Also Mortgage Brokering



# HUD's View of Section 8(c)(2)

- Almost 40 Years of HUD/Court interpretation.
- Per HUD, compliant 8 (c)(2) arrangements needed to meet the following test:
  - **Pay no more than reasonable value**
  - **Services must be “actual, necessary and distinct”**
- **Regulation X** states *“that, if a payment bears no reasonable relationship to the value of the services provided, then the excess may be a payment for a referral.”*





# The PHH Decision

- Initial DC Circuit Court Opinion:
  - On October 11, 2016, a **three-judge panel** (written by SCOTUS nominee Brett Kavanaugh) issued a decision overturning Bureau’s \$109 million penalty against PHH.
    - On RESPA issues, Kavanaugh said “[it’s] **not a close case....** Section 8(c) creates a safe harbor, [by] stating: ‘**Nothing**’ in Section 8 ‘shall be construed as prohibiting’ the “payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed.” **Nothing means nothing...**”
  - Bureau appealed, and received full en banc hearing.





# The PHH En Banc RESPA Appeal

- Does the 8(c)(2) “goods, facilities and services rendered” exception permit payments to referral sources despite § 8 (a)’s prohibitions?
- Can Bureau issue retroactive interpretations and no statute of limitations for Bureau admin. actions?
- January 31, 2018 En Banc agreed with Kavanaugh:
  - ***“The panel opinion, insofar as it is related to the interpretation of RESPA... is accordingly reinstated...”***
  - Kavanaugh got it right on RESPA. **NOTHING REALLY MEANS NOTHING.**



# PHH Epilogue

- Mulvaney dismissed the PHH Case on June 7 saying,
  - *“Thus, it is now the law of this case that PHH did not violate RESPA if it charged no more than the reasonable market value for the reinsurance it required the mortgage insurers to purchase, **even if reinsurance was a quid pro quo for referrals**”*
  - Under Mulvaney, it is clear Bureau will not pursue expansion of RESPA interpretation or enforcement.
  - So, again, does this mean “Open Season” on RESPA?  
**NO, but what does it mean?**





# What the PHH Decision Means

- **Kavanaugh's opinion endorsed HUD's 2-part test for Section 8(c)(2) compliance:**
  - Part 1: Services and Goods
    - Actual = real
    - Necessary = useful, meaningful
    - Distinct = not done elsewhere in transaction
  - Part 2: Reasonable Market Value
    - What would be paid in the absence of referrals
    - Cannot be based on amount or volume of referrals
    - paid in excess is a violation of Section 8(a)

**\*Referral of business does not prevent Section 8(c)(2) compliance**



# Compliance is Still Critical

- **Do not pay > reasonable value (“RV”) for services**
  - PHH - were captive Reinsurance fees reasonable?
  - Amount in excess of RV viewed as payment for referrals.
- **Set up systems / recordkeeping for compliance**
  - RV valuation is key. Use 3rd party to avoid claim of bias.
  - Make sure you get what you pay for - audit and verify
  - Have properly structured and drafted legal agreement.
  - Support narrative of “necessary services” for branding.
    - (No pay to play, referral agreements or unneeded items)
- **Train staff and referral sources re the narrative.**





# Compliance Malpractice?

- Cordray’s “Compliance Malpractice” comment:
  - Overemphasized role of enforcement-based guidance, e.g. Consent Orders / MSA Memo
    - Not binding like laws and formal regulations
  - Reconsider *weight* of Enforcement-based “guidance”.
    - Still valuable information / insights for risk assessment
  - Mulvaney says he will not be using enforcement to expand regulatory reach, so, at least for now, that weight is lessened.



# Limits to PHH Decision

- RESPA has a 3 year statute of limitations
- Possible whipsaw with different Bureau leadership?
  - Who will be Bureau Director and for what term?
  - Bureau chose not to appeal to SCOTUS
- DC Circuit is **not** the Supreme Court:
  - Binding on Bureau in Washington DC, but unclear about other Circuits and plaintiffs (AG's and / or class actions)
- **Create durable, defensible relationships that are unlikely to be challenged regardless of changes.**





# Catalyst for a Better Process?



*Advertising, Sponsorship and  
Related Agreements*



*Office Sublease &  
Desk Rental  
Agreements*



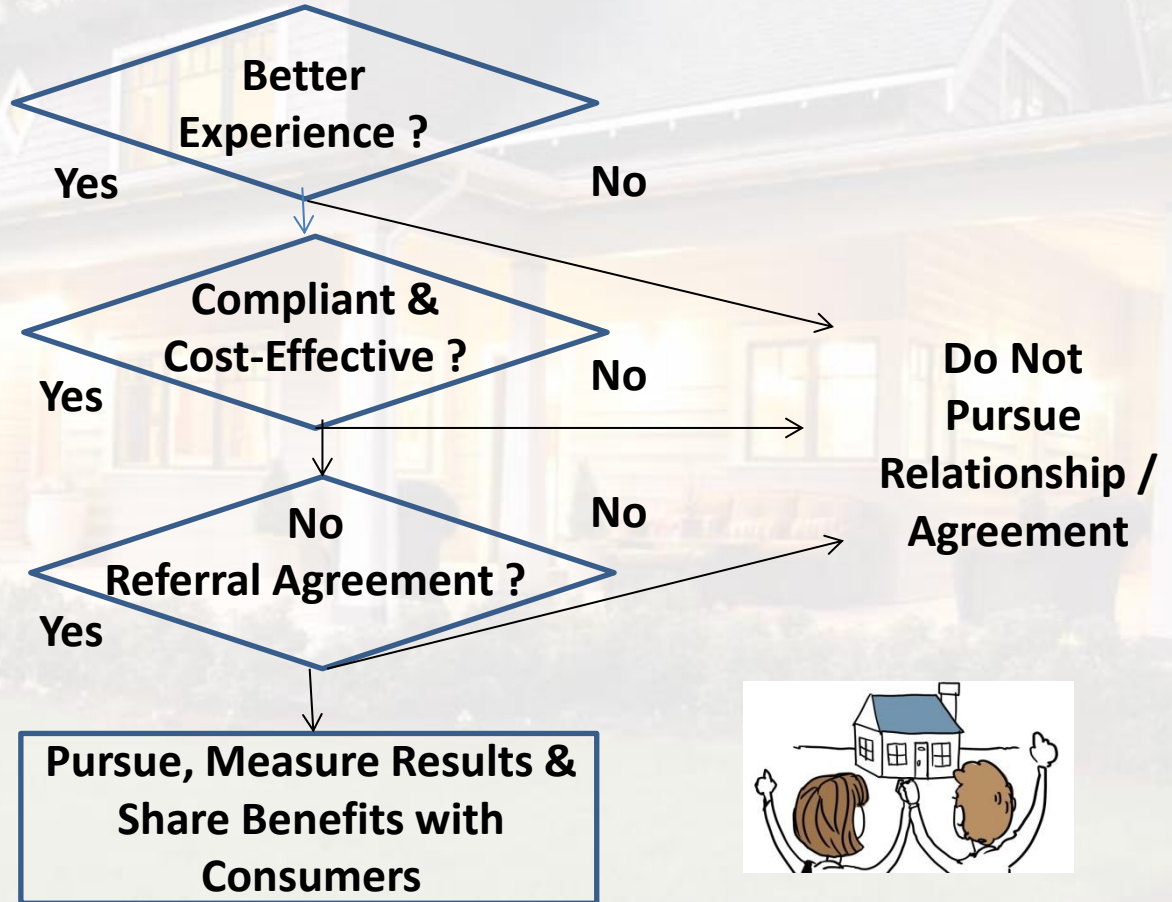
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# Enhancing Homebuyer Experience

- Purchase business is a critical industry channel.
- Settlement service providers must cooperate for timely closing of home purchases.
- Collaborative Agreements can help deliver more effective and efficient processes and experience for consumers
- A better home buying experience is an important differentiator for branding, competing for and winning purchase business.

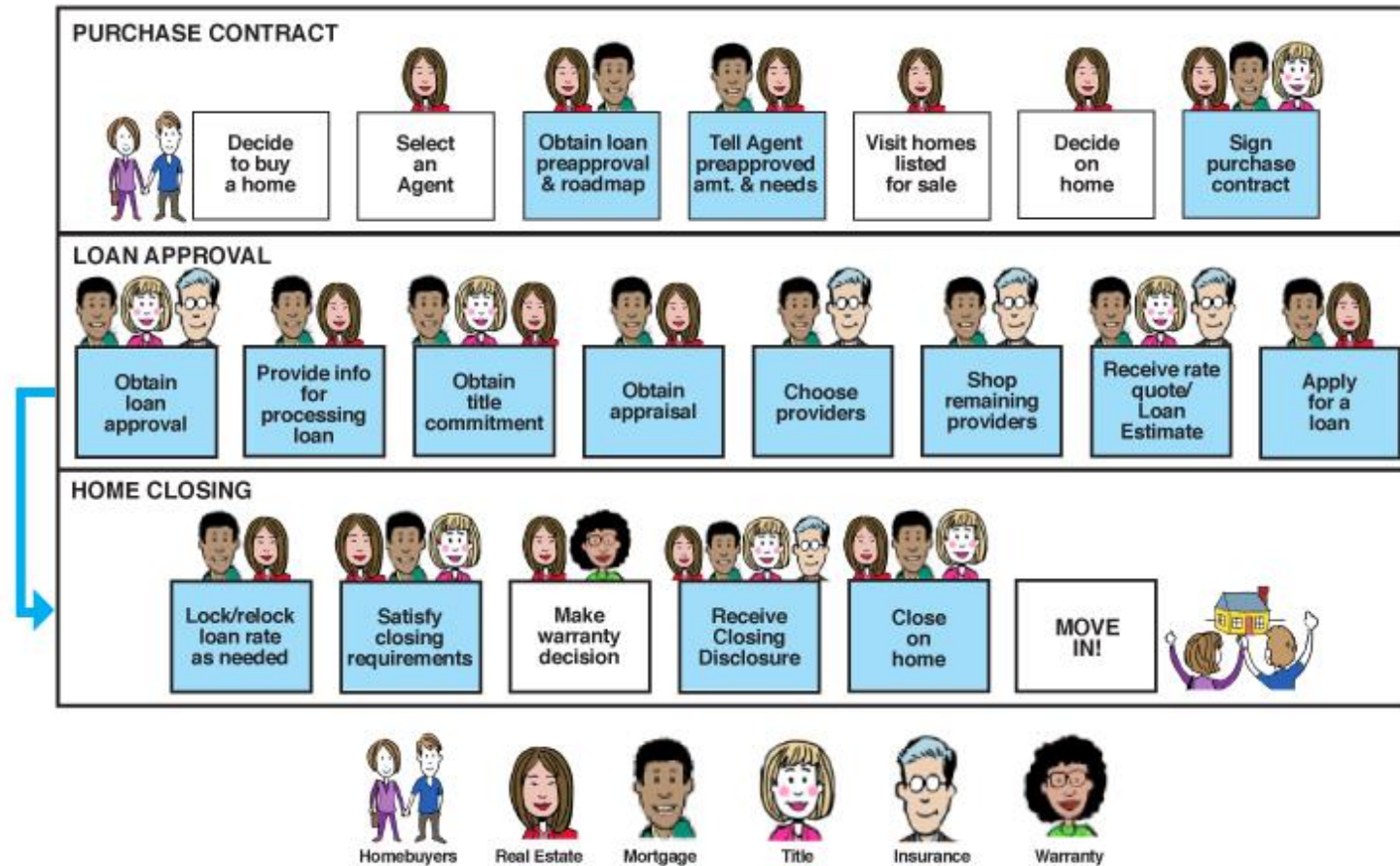


# Is a Strategic Relationship Wise?





# A Better Home Buying Experience



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# Useful Narratives

- Strategic relationships are a catalyst for creating a better home buying process and experience.
- MSAs and Web Advertising help settlement providers “Brand who they are and what they do to effectively compete for the business”.
- Office Leases promote convenience and collaboration.



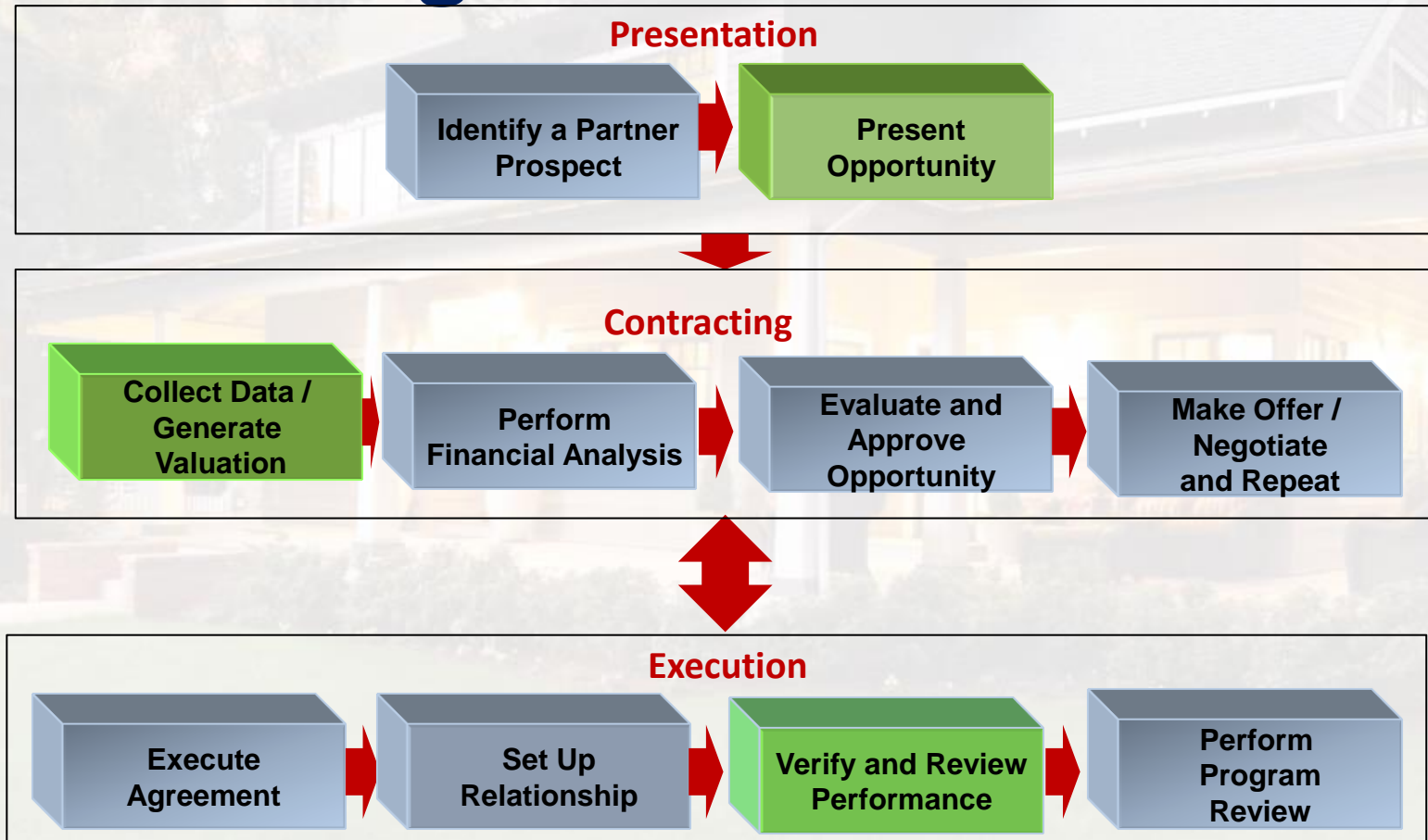
# Advertising - Proactive Practices

- Contract primarily public facing advertising.
- Don't over emphasize internal branding.
- Implement formal Marketing Policies & Procedures.
- Train participants.
- Manage RESPA compliance via compliance function and Assess advertising results separately.
- Value services Independently.
- Set conservative flat fee.
- Verify services and pay conservatively





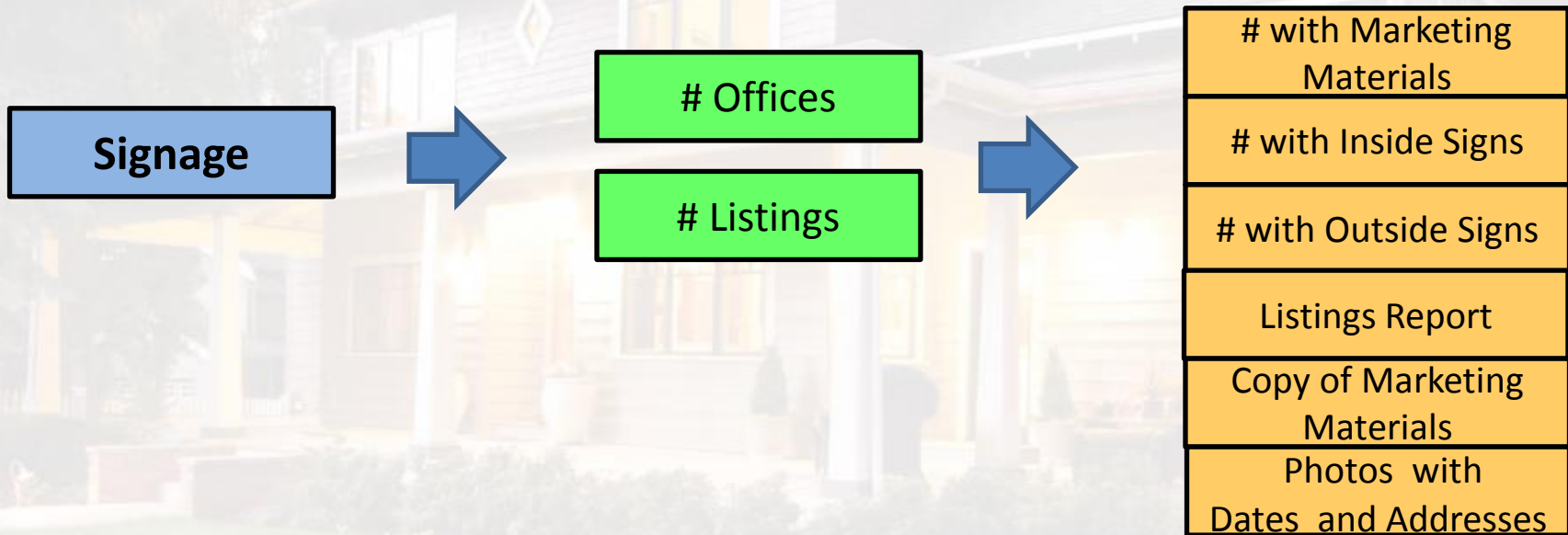
# Marketing Policies & Procedures



# Valuation Components *Example*



# Verification Documentation *Example*





# Signage Outside Listings – Verification

## Report *Example*

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: Photos of listing yard signs (FULL/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 *Example*



# Web Related Considerations



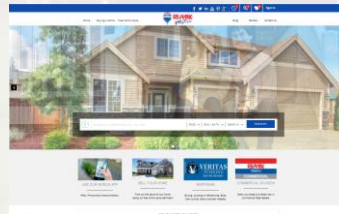
- Do not pay for “Direct Sales Pitches” (HUD).
- Describe as “Paid Advertising”.
- Value Web Advertising / Social Media / Intranet / Third-Party Platforms independently.
- Verify services and collect metrics re impressions.
- Again, set and pay fees conservatively.
- Pay proper share of Co-Marketing - Third Party Media
- Work leads purchased.





# Web Advertising Valuations

- Key attributes to consider:
    - Size/Type of ad?
    - Location of ad?
      - Above or below the “fold”?
    - Ad/link framed, menu choice or served by page?
    - Ad in rotation?
  - Buy/place smart to Value smart:
    - Where’s the traffic???
      - Listing pages and property search pages
      - Home page
      - Financing page
      - Provider(s) page
- Fully enabled for mobile devices?



# Social Media Considerations

- Advertisers are subject to whims of community with little control over real time commentary.
- Change is happening fast on social media platforms.
- Providers are finding ways to attract / monetize audiences, and offer better ways to reach targets:
  - Pinned posts
  - Showcase pages
  - Video
  - Enhanced messaging



# Social Media Valuations

- Different platforms reach different types of audiences and value differently for advertisers, for example (these are generalizations):
  - Facebook – skews mature
  - Instagram – skews young
  - Twitter – skews engaged
  - LinkedIn – skews educated
- Ask marketing partner how they are managing a proactive use of social media to promote the brand.





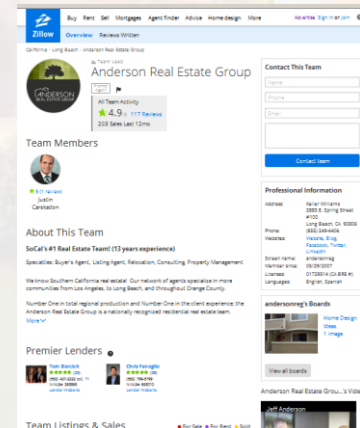
# Third Party Platform Considerations

- SO MANY platforms (National, regional, local)...market is constantly evolving and changing:
  - Key national providers include Zillow, Boomtown!, and Commissions, Inc.
- Are they direct-billing multiple parties (and can you treat this as cooperative advertising) or does the site owner pay and then charge an advertiser?



# Third Party Platform Valuations

- Value services the site owner or platform provider is offering (examples include leads/lead management, CRM and outbound email, statistical reporting, etc.).
- Are there compliance implications for you if you utilize all platform services?
- Are you sharing in the SEO/SEM costs?



# Office Sublease - Proactive Practices

- Separate Office Lease Agreement from MSA.
- Think primary versus temporary space.
- Contract for longer term (1 year vs. 1 month).
- Value space, amenities and services independently.
- Use independent general market valuation.
- Again, set conservative flat fee.
- Actually occupy space and license location, if applicable.





# Accounting for all the Office Services

- From analysis on thousands of MLinc ComplyOffice™ historical valuations:
  - ~50% of the average general market value is Amenities (conference room use, kitchen access, receptionist/answering services, copy/fax/printer/scanner use, etc.)
  - ~20% of the average general market value is Facilities (furniture/furnishings, common area, janitorial, etc.)
  - ~30% of the average general market value is Base Rent and Utilities.



# General Market Value

- Include comparables outside the residential settlement services industry.
- Value space, amenities and other related services.
- Use most current, relevant data available.
- DO NOT value potential referrals.
- Commercial Appraisers may not understand RESPA.



# Don't Depend on the Referral Source

- Don't let the lessor dictate a price.
- Don't just pay what the broker's agents are paying (training, license management, MLS fees, technology may be included).
- Don't let the lessor provide comparables, especially if they own the building or have a commercial listing business (avoid appearance of a conflict of interest).





# Responding to Regulatory Exams

- Person responsible for responding must be able to articulate Narrative and work with legal counsel to respond properly to questions
- Show documentation of Policies (including Narrative), Procedures, compliance management program, internal audits and responsive actions.
- Be ready with “the rest of the story” (home buying experience, surveys, etc. (beyond RESPA)).



# Other Proactive Practices

- Do not limit consumer choice (economic coercion):
  - No penalty for using other providers
  - No “Exclusive” relationships nor penalty for using others
- Disclose Services Agreement to public.
- Avoid:
  - “Endorsement” or “Preferred provider” language.
  - Communications contrary to compliant reason for SRs.
  - Partners with no interest in RESPA compliance.
  - Mixing RESPA compliance and business measurement.



# RESPA Compliance Management

- Articulate and implement a RESPA compliance management program.
  - Audit & Test compliance vs. Policies and Procedures.
  - Maintain record of compliance reviews.
  - Act to correct non-compliance.
  - Train participants to understand / articulate narrative.
  - Monitor RESPA developments on state / federal level.
- Hire legal counsel / prepare compliant Agreements.





# 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 Marketing Services or other relationships among settlement service providers or others should be discussed with legal counsel to determine its compliance with all applicable laws.



# Mark L Meyer Bio

- 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



# Brian Levy Bio

- Brian S. Levy, Of Counsel with Katten & Temple, LLP, provides compliance, transactional and regulatory guidance and training for banks, mortgage originators and related providers. Brian has unique sales and in-house experience enabling him to provide practical and creative strategies and guidance on matters involving RESPA (web marketing, MSA's, lead sharing, desk leases, AfBA's, etc.), mortgage repurchase defense, loan sales, LO Compensation and other regulatory requirements and enforcement issues for mortgage lenders, banks and other settlement service providers.
- Brian is a frequent conference speaker was the 2006 Chairman of RESPRO. Among other articles and publications, Mortgage Banking's April 2016 edition contained Brian's article, *CFPB's Enforcement-First Approach*, analyzing the CFPB's enforcement-based method of providing compliance guidance. Brian was General Counsel for a regional bank in Milwaukee WI for 15 years and prior to that worked for 5 years in private practice handling primarily commercial real estate law with a large international law firm. Brian graduated from the University of Illinois at Urbana-Champaign, (A.B., 1986, Summa Cum Laude and Phi Beta Kappa) and Harvard Law School (J.D., 1989). Brian can be reached at 262/241-7977 or [blevy@kattentemple.com](mailto:blevy@kattentemple.com) and can be followed on Twitter @BrianSLevy.

[www.kattentemple.com/bri.html](http://www.kattentemple.com/bri.html)

