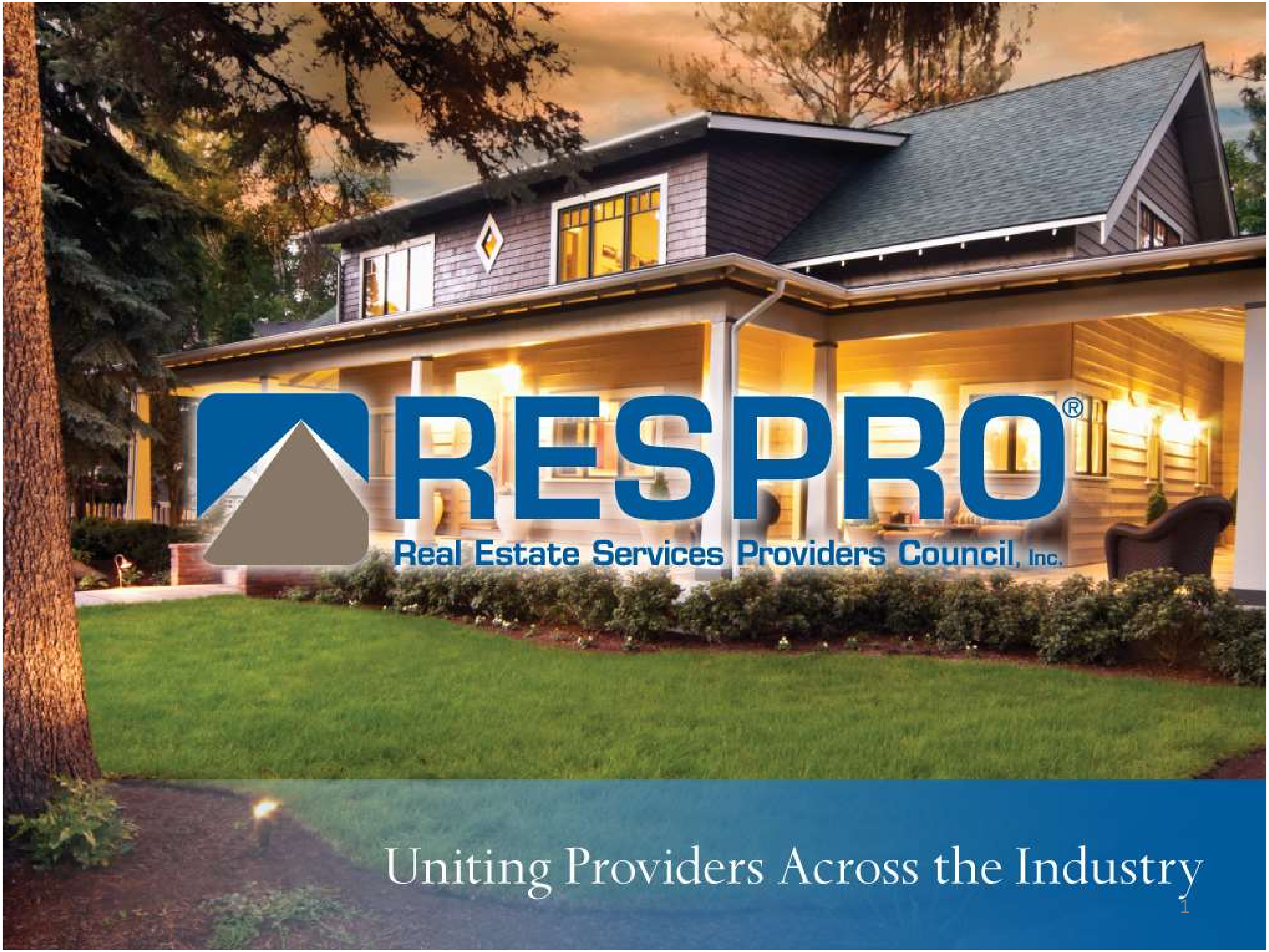
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What's New in Valuations Since The MSA FAQs?

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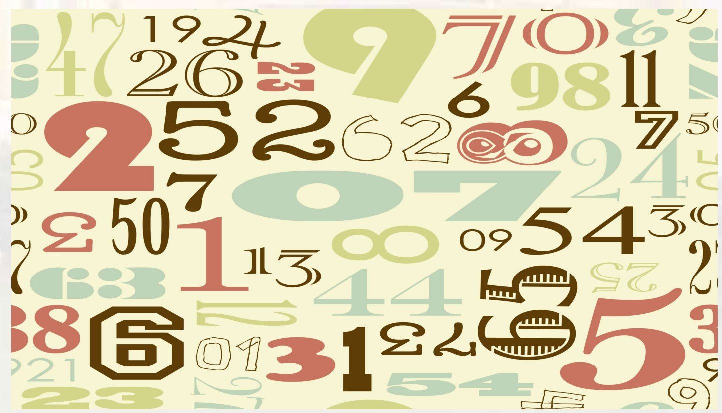
Presentation Summary

- **History of CFPB RESPA / MSA Enforcement**
  - Pre-CFPB
  - CFPB under Cordray
  - PHH and FAQs
- **Current MSA Environment**
- **MSA Compliance Lessons**
- **Emphasis on Narrative**
- **Valuation Trends**
- **Q & A**



RESPA Anti-Kickback Reset

“Old School” (pre CFPB) Compliance

- RESPA Section 8(a) enacted to stop payment for referrals
- Generally poorly managed risk/relatively low penalties for violations
- Industry wanted clarity on exceptions 8(c)(2) for services rendered and 8 (c)(4) on Affiliated Business Arrangements
  - Grant Mitchell offered HUD’s 8 (c)(2) interpretations
  - Sham JV Policy Statement in 1996
- MSAs emerged in early 2000s with inadequate attention to compliance
  - MLinc commenced MSA Valuations in 2010

RESPA Anti-Kickback Reset
CFPB 8(a) Enforcement

- Mostly focused on 8(c)(2) services rendered exception
  - No formal guidance
- Asserted RESPA violations via enforcement/Consent Orders
  - Lighthouse Title
  - Prospect Mortgage
  - Eghbali
- Culminated in 2015 Memo saying MSAs likely violate RESPA
- Articulated further in Cordray's opinion in PHH's appeal of ALJ decision

RESPA Anti-Kickback Reset

CFPB 8 (a) Enforcement since 2016

- Cordray and CFPB rebuffed by DC Circuit (more later)
  - Essentially overruled the MSA Memo too
  - Left industry and other regulators unsure of CFPB position
- 2020 FAQs / informal guidance
  - Formally revoked the MSA Memo-5 years to the date
  - Clarified services rendered exception to be consistent with old HUD interpretations
  - Still worried about disguised referral fees (Narrative is critical)

RESPA Anti-Kickback Reset

Meanwhile….

- New technologies / interactions among providers emerge
  - ➢ Social Media (e.g., re postings, likes, etc.)
  - ➢ Internet lead generation
- No guidance / enforcement involving the new technology
  - ➢ CFPB investigation into top social media provider dropped without explanation
  - ➢ Regulatory enforcement focus appears to be elsewhere
    - ✓ Fair lending, student loans, payday, COVID relief
    - ✓ Return to Cordray era "regulation by enforcement" tactics?

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PHH Fights Back Against CFPB

- PHH was first to take CFPB to court over interpretations
- Despite prior HUD approval, PHH's captive MI found by CFPB ALJ to violate RESPA
- CFPB ALJ decision was appealed to Cordray who:
    - Increased penalties from $6 mm to $109 mm
    - Said payment must be reasonable **and bona fide**
    - Clarified presumption of existence of referral agreement
    - Said 8(c)(2) was not an exception when coupled with referral agreement

The PHH Decision

- October 2016, a three-judge DC Circuit panel rejected Cordray's 8(c)(2) RESPA interpretation
  - On RESPA, Kavanaugh wrote, "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**…"
- January 2018, En Banc panel agreed with Kavanaugh, rejecting the CFPB's RESPA interpretation from Cordray era
- Mick Mulvaney ultimately dismissed the PHH Case

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PHH Decision Impact

- The MSA Memo was essentially overruled by the DC Circuit
  - **Judicial decisions > regulatory interpretation**
  - Still conflicting guidance for non-legal scholars
- Kavanaugh's opinion endorsed HUD's 2-part test for Section 8(c)(2) compliance:
  - ➢ Part 1: Services and Goods are Actual, Necessary and Distinct
  - ➢ Part 2: Reasonable Market Value
    - ✓ What would be paid in absence of referrals
    - ✓ Cannot be based on amount or volume of referrals
    - ✓ Payment in excess is a violation
- Referrals does not prevent Section 8(c)(2) compliance

Other Regulators Weigh In

- State mortgage and title regulators have questioned MSAs often citing to CFPB 2015 Memo
- FDIC takes action:
  - 2019 Consent Order found improper co-marketing and desk rental arrangements
  - No detail in Order about what exactly was improper
  - "These arrangements and agreements resulted in the payment of fees by the bank to real estate brokers and home builders for their referrals of mortgage loan business, in violation of RESPA
  - FDIC press release acknowledged these relationships could be compliant if payment is not in excess of fair market value
  - A compliant narrative is key

The RESPA FAQs – Summary MSA Points

- 5 years to the date after issuing it, CFPB rescinded the 2015 MSA Memo and issued the RESPA FAQs:
  - Whether a particular MSA is compliant or in violation of RESPA depends on specific facts of the case
  - A lawful MSA involves marketing services that are actual necessary and distinct and payment is reasonably related to the value of the services

The RESPA FAQs – Summary Points Continued

- MSAs that are a disguised payment for referrals are still prohibited
- Frontline employees can ruin good work of legal and compliance departments with bad communications with referral sources
- Reinforces need for training on a compliant narrative.

Present Regulatory Environment

- FDIC appears focused on MSA valuations and monitoring (see Loretta's article in RESPA News)
- FAQs just 6 months old
- New CFPB Leadership: (Uegio is Interim/Chopra TBD)
- Apparent CFPB Emphasis:
  - Racial justice and COVID relief
  - Mortgage servicing (forbearance and foreclosures), fair lending, debt collection, student lending and payday loans
- RESPA doesn't seem to be a primary focus at this time:
  - Perhaps due to lack of objective consumer harm?
  - Too complicated to design policy in the internet lead space?

MSA Compliance Lessons

- **Do not pay more than reasonable value for services** (amount in excess viewed as payment for referrals)
- **Implement systems and recordkeeping to document compliance**
  - Valuation is key. Consider using 3rd party to avoid claim of bias
  - Make sure you get what you pay for-audit and verify
  - Support the narrative of necessary services for branding and marketing (no pay to play, no referral understanding and no pay for things you don't need
- **Train sales staff and referral sources to articulate the RESPA compliant narrative (branding, not payment for referrals)**

Current Market/Compliance

- With interest rates rising and refinances on the decline, renewed emphasis on purchase business and relationships with potential referral sources (MSAs, Office Subleases, Sponsored Events, Lead Generation, Co-Marketing, etc.)
- MSA participants training salesforce and reinforcing compliant narrative
- No agreement or understanding regarding referrals
- No warm handoffs or direct endorsements
- Emphasis on independent MSA Valuation and Monitoring / Verification

Emphasis on a Compliant Narrative

- Settlement providers must market to grow and prosper
- MSAs are paid advertising allowing these providers to brand who they are and what they do so they can compete for and win business
- The real estate environment is a fertile ground for these providers to market, as consumers are predisposed to need mortgage, title, insurance, warranty and related services
- Regulatory pressures are leading to settlement providers underpaying for marketing
- When expenses are decreased, consumers can also benefit

Emphasis on a Compliant Narrative Continued

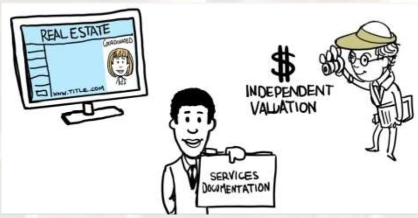
- Companies are using these types of relationships to collaborate to create a better home buying process and experience
- Consumer surveys, showing positive results help demonstrate providers aren't harming homebuyers

The MSA Decision Tree

Creating Better Home Buying Process with Marketer Partner ?

Yes → **Negotiating and Executing Compliant, Cost-Effective MSA?**

No → **Do Not Pursue an MSA**

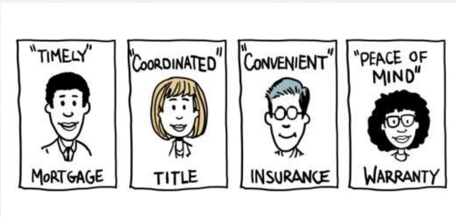


Yes → **Purchasing Advertising (Versus Referrals)?**

No → **Do Not Pursue an MSA**

Yes → **Pursue MSA, Advertise Better Process, Measure Results Share Benefit with Home Buyers**

No → **Do Not Pursue an MSA**



MSA Valuation Basics

- MLinc Methodology: Set value of service at cost of marketing exposure or impressions with no direct relationship to what company being advertised receives in return
- Be conservative in setting fees in case services are not all performed exactly as expected
- For co-marketing through traditional media sources (newspaper, magazine, radio, TV, etc.), pay share of invoice based upon % share of content or use.

MSA Valuation Basics Continued

- Obtain new MSA values if activity levels change dramatically, if the agreement is being renewed, or if a year has passed, whichever comes first
- Monitor actual services completed and verified on a monthly basis and calculate associated value as the basis for payment

MSA Pandemic Adjustments

- Apply “Current” versus “Normal” activity level adjustment to service values for materials and signage displayed at listings and sales offices
- Substitute “Virtual” versus “In Person” sponsored meetings to obtain value, as long as there is similar exposure for sponsor (e.g., on Marketer’s training calendar, all active sales people / agents are invited, meeting agenda is distributed, sponsor is introduced, etc.)

Current Valuation Trends

- Sponsorship of virtual events:
  - Video tours of listings
  - Webinars
  - Consumer focused programs
- Affinity group marketing:
  - National associations of professionals
  - National industry organizations
- Large technology platform marketing and support services
- Lead generation
- Social media co-marketing

Q & A

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