

# Setting Up a Compliant AFBA

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- **Trip Riley** | Partner | Saul Ewing LLP  
[francis.riley@saul.com](mailto:francis.riley@saul.com)
  - **Aaron Davis** | CEO | Florida Agency Network  
[aaron@amd-1.com](mailto:aaron@amd-1.com)

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# Section 8(c)(4) – Affiliated Business Arrangements

- AfBAs
  - Prior to 1983 affiliations unlawful
  - Example: ABC Mortgage Company
    - Real estate broker A and B, and mortgage broker C form ABC Mortgage Company
  - 1983 RESPA Act amendments
    - 3-part Safe Harbor Test

# Section 8(c)(4) – Affiliated Business Arrangements

- 1992 RESPA Regulations Give Distinct Advantages to AfBAs
  - Employer may pay Employee for any referral activities
  - Discounts or rebates to consumers to entice them to use AfBA are permitted

# Section 8(c)(4) – Affiliated Business Arrangements

- 1996 HUD Policy Statement
  - HUD addresses abuses
  - 10 factors considered to determine bona fide AfBAs
  - Need not meet all 10 factors
  - Weigh factors to determine if AfBA is bona fide
- CFPB announced in September 2023 that it follows Policy Statement
- *Carter v. Welles-Bowen Realty* (Nov. 2013)
  - 6th Circuit states include Kentucky, Michigan, Ohio, Tennessee
  - Policy Statement not entitled to deference

## Section 8(c)(4) – Borders & Borders

- Western District of Kentucky (in 6<sup>th</sup> Circuit)
  - Upholds suspect AfBA on 8(c)(4) grounds
  - Then on basis of 8(c)(2)
- Facts
  - No employees
  - Single person services 9 AfBAs
  - No office
  - Disclosures given out at closing table
- Need to meet Section 8(c)(4) 3-part Safe Harbor Test

# Affiliated Business Arrangements/Joint Ventures

- Section 8(c)(4) 3-part Safe Harbor Test
  - Disclosure to consumer on separate sheet of paper identifying affiliate relationship, no required use, and estimate of AfBA's charges
  - No required use
  - Returns based strictly on ownership interest
    - No payments based on volume of business
    - Can pay for services performed

# Affiliated Business Arrangements/Joint Ventures

- Meet HUD 10-point test
  - 10-point test includes factors regulators weigh to evaluate whether AfBA is a bona fide entity
    - Capitalization
    - Dedicated employees
    - Separate office space
    - Core services
    - Management
    - Contracting out services
    - Marketing
    - Exclusivity with owners



# Affiliated Business Arrangements/Joint Ventures

- Both HUD and CFPB settlement agreements or consent orders have targeted “sham” AfBAs
  - Owners received distributions based on referrals
  - Affiliated entity was not sufficiently capitalized
  - Affiliated entity had no employees or leased employees from the AfBA owner
  - Affiliated entity did not have separate office space
  - Affiliated entity did not perform substantive work
  - Owner failed to provide AfBA disclosure statements or used non-compliant forms
  - Owner required the use of the affiliate by including checkboxes in pre-printed forms

# Affiliated Business Arrangements/Joint Ventures

- Recent interpretations by state regulators:
  - State anti-inducement law is silent on AfBAs and, therefore, prohibits them
  - Real estate agent owners problematic
  - Opportunity to invest is prohibited thing of value
  - High return on investment viewed suspiciously
  - View of initial capital requirement
  - View outside business as a requirement

# Poll Question

**Can a title company give a borrower an incentive, such as a chance to win a trip or a rebate, for doing business with the title company?**

- Yes
- No
- Depends

# Affiliated Business Arrangements/Joint Ventures

- Considerations for compliant AfBAs
  - Disclosure in all cases of a referral
  - Closing cost incentives ok
    - Don't forget to consider state law implications
  - Distributions
  - Invest initial capital sufficient to operate business
  - Dedicated employees working from AfBA's office space
  - Employees perform core services
  - Adding/removing members
    - Cannot be based on referrals
    - How to handle owners with low referral volume

**Baltimore**

1001 Fleet Street  
9<sup>th</sup> Floor  
Baltimore, MD 21202  
T: (410) 332-8600 • F: (410) 332-8862

**Boston**

131 Dartmouth Street  
Suite 501  
Boston, MA 02116  
T: (617) 723-3300 • F: (617) 723-4151

**Chesterbrook**

1200 Liberty Ridge Drive  
Suite 200  
Wayne, PA 19087  
T: 610.251.5050 • F: (610) 651-5930

**Chicago**

161 North Clark Street  
Suite 4200  
Chicago, IL 60601  
T: (312) 876-7100 • F: (312) 876-0288

**Fort Lauderdale**

200 E. Las Olas Blvd.  
Suite 1000  
Fort Lauderdale, FL 33301  
T: (954) 713-7600 • F: (954) 713-7700

**Harrisburg**

Penn National Insurance Plaza  
2 North Second Street, 7<sup>th</sup> Floor  
Harrisburg, PA 17101  
T: (717) 257-7500 • F: (717) 238-4622

**Los Angeles**

1888 Century Park East  
Suite 1500  
Los Angeles, CA 90067  
T: (310) 255-6100 • F: (310) 255-6200

**Miami**

701 Brickell Avenue  
17<sup>th</sup> Floor  
Miami, FL 33131  
T: (305) 428-4500 • F: (305) 374-4744

**Minneapolis**

33 South Sixth Street  
Suite 4750  
Minneapolis, MN 55402  
T: (612) 225-2800 • F: (612) 677-3844

**New York**

1270 Avenue of the Americas  
Suite 2800  
New York, NY 10020  
T: (212) 980-7200 • F: (212) 980-7209

**Newark**

One Riverfront Plaza  
1037 Raymond Blvd., Suite 1520  
Newark, NJ 07102  
T: (973) 286-6700 • F: (973) 286-6800

**Orange County**

5 Park Plaza  
Suite 650  
Irvine, CA 92614  
T: (949) 252-2777 • F: (949) 252-2776

**Philadelphia**

Centre Square West  
1500 Market Street, 38<sup>th</sup> Floor  
Philadelphia, PA 19102  
T: (215) 972-7777 • F: (215) 972-7725

**Pittsburgh**

One PPG Place  
Suite 3010  
Pittsburgh, PA 15222  
T: (412) 209-2500 • F: (412) 209-2570

**Princeton**

650 College Road East  
Suite 4000  
Princeton, NJ 08540  
T: (609) 452-3100 • F: (609) 452-3122

**Washington, D.C.**

1919 Pennsylvania Avenue, N.W.  
Suite 550  
Washington, DC 20006  
T: (202) 333-8800 • F: (202) 337-6065

**West Palm Beach**

515 N. Flagler Drive  
Suite 1400  
West Palm Beach, FL 33401  
T: (561) 833-9800 • F: (561) 655-5551

**Wilmington**

1201 North Market Street  
Suite 2300 • P.O. Box 1266  
Wilmington, DE 19899  
T: (302) 421-6800 • F: (302) 421-6813

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# The Suite Spot

for Settlement & Closing Operations

-  STRATEGIC GROWTH
-  EFFICIENT OPERATIONS
-  EXCEPTIONAL COMMUNICATION
-  ENHANCED TECHNOLOGY

# CORE vs NON CORE SERVICES

## (from Chat GPT)

1. **Core Services:** Core services are the fundamental offerings provided by a title insurance company. These services primarily revolve around issuing title insurance policies and ensuring that the title to a property is clear and marketable. Core services may include:
  1. **Title searches:** Investigation of public records to determine the legal ownership of a property and any existing liens or encumbrances.
  2. **Title examination:** Examination of the title search results to assess the ownership history and identify any issues that may affect the title.
  3. **Title insurance policies:** Issuing insurance policies that protect property owners and lenders against financial losses due to title defects, liens, or other encumbrances.
  4. **Closing and escrow services:** Facilitating the closing process, including the collection and disbursement of funds, preparation of closing documents, and ensuring all legal requirements are met.
2. **Non-Core Services:** Non-core services are additional offerings provided by a title insurance company that may complement its core services or cater to specific customer needs. These services may vary depending on the company but can include:
  1. **Property reports:** Providing reports on property ownership history, tax information, and other relevant data.
  2. **Survey coordination:** Arranging for property surveys to determine boundary lines and easements.
  3. **1031 exchange services:** Facilitating tax-deferred exchanges of like-kind properties under Section 1031 of the Internal Revenue Code.
  4. **Title curative services:** Resolving issues identified during the title examination process, such as clearing title defects or correcting errors in public records.
  5. **Flood zone determinations:** Assessing whether a property is located in a designated flood zone and providing flood insurance information.

# EXAMPLES OF NON-CORE SERVICES





# THE BENEFITS OF PARTNERING WITH OUTSOURCE PROVIDER



## ELIMINATES

- Staffing Challenges
- Missed Revenue Opportunity
- Data Duplication



## IMPROVES

- Lead Capture
- Profit Margins
- Customer Experience



## MINIMIZES

- Downtime / Overtime
- Overhead / Employee Cost
- Recruiting Obstacles



## INCREASES

- Productivity & KPI Tracking
- Revenue & Profits
- Staff Retention

# Poll Question

## Which is considered a core service?

- Curative efforts
- Survey coordination
- Searches
- Property reports

# MORE ITEMS TO CONSIDER



## Scale Your Business:

Grow multi-Region, Multi State

Solve for hiring decisions

Long term vs Short Term spike in orders



## Technology:

Title Production system

Allow for custom workflow?

Central Processes?

Integration?



## Improve Efficiency:

Is a \$20/hour employee doing a \$10/hour task?

Round the clock vs 8am to 5pm?



## Core v Non Core Infrastructure:

Focus Core Services at branch level

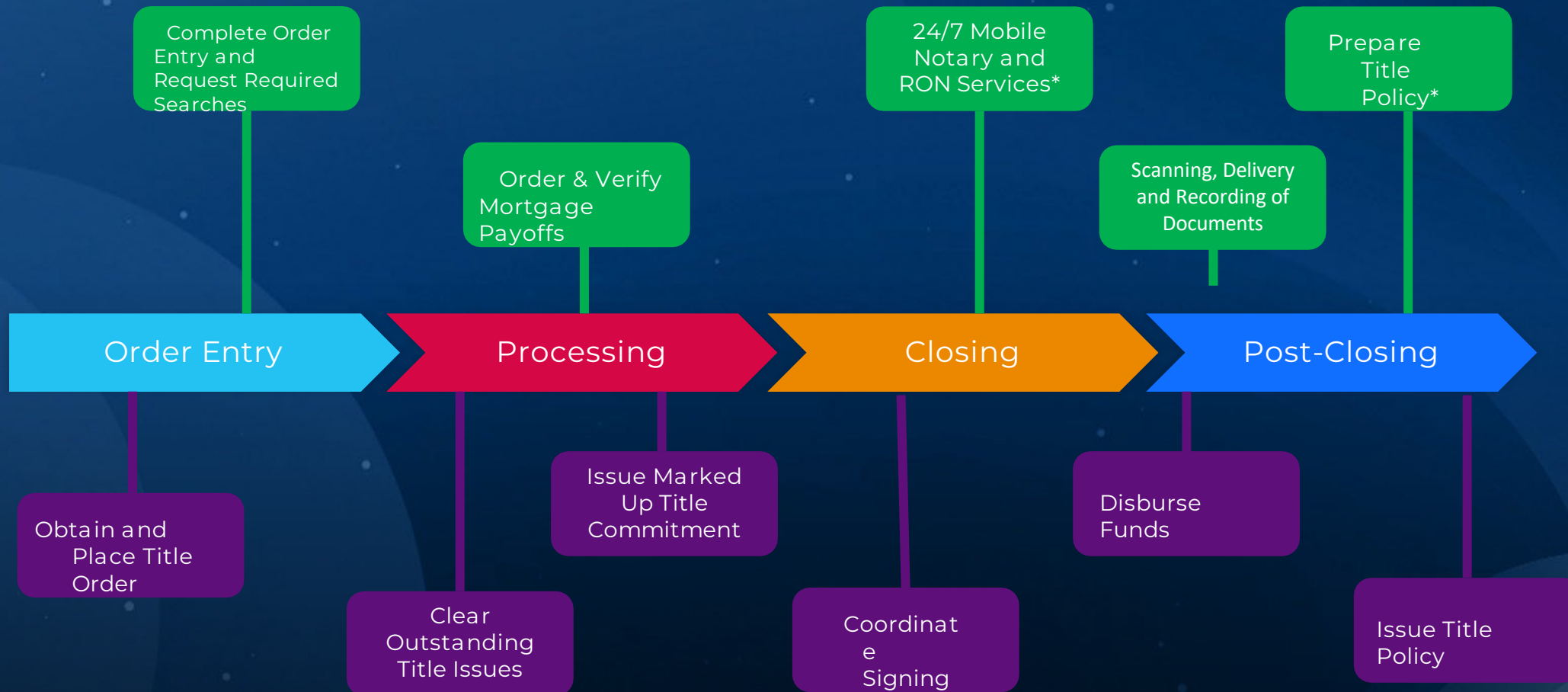
Maintain more client interface

Properly Structure Backoffice off site

Client Facing vs Non-Client Facing

# Augmented Settlement Example

## Tasks Completed By BPO



## Tasks Completed by Title Agency

## CONTACT:

Aaron Davis  
[aaron@amd-1.com](mailto:aaron@amd-1.com)

