

Who Owns the Note?: A Securitization Primer

Arizona Foundation for
LEGAL SERVICES
& EDUCATION
THE ARIZONA BAR FOUNDATION

Tara Twomey, Of Counsel, National Consumer Law Center

Lauren Mahoney
National Consumer Law Center

January 22, 2015

NCLC[®]
NATIONAL
CONSUMER
LAW
CENTER[®]

This webinar is made possible by the Arizona Attorney General's Office with funding from the National Mortgage Settlement.

©National Consumer Law Center



Presenter – Tara Twomey

- Tara Twomey is currently Of Counsel to the National Consumer Law Center and the Project Director for the National Consumer Bankruptcy Rights Center.
- She has previously lectured at Stanford, Harvard and Boston College Law Schools.
- She is a contributing author of several books published by the National Consumer Law Center, including [Foreclosures](#) and [Bankruptcy Basics](#).

Who Owns the Note?

A Primer on Securitization

Tara Twomey
National Consumer Law Center
2015

My understanding of RMBS

Securitization is:

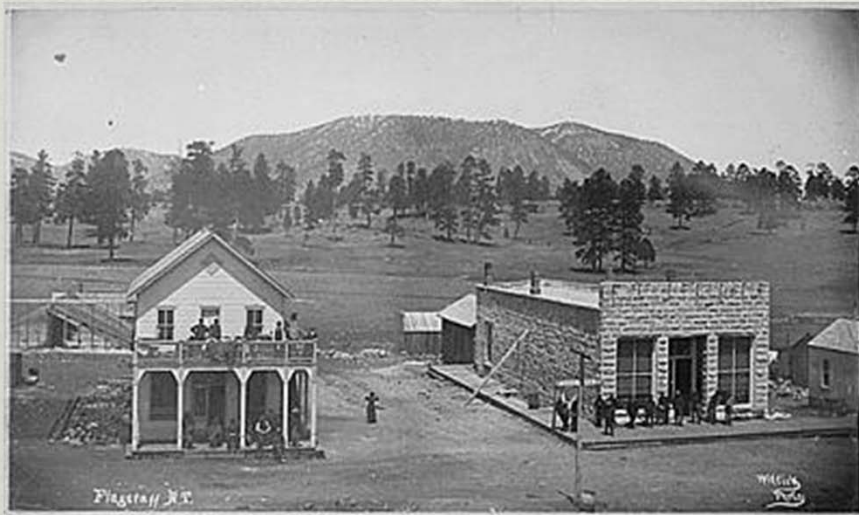
- a. Beginner (none or little)**
- b. Intermediate (I get the basics)**
- c. Advanced (I know enough to be trouble)**
- d. Expert!**

True or False

In Arizona a deed of trust may only be enforced by, or on behalf of, a person who is entitled to enforce the obligation that the deed of trust secures.

- a. True**
- b. False**

**Who
Cares?**



Originator

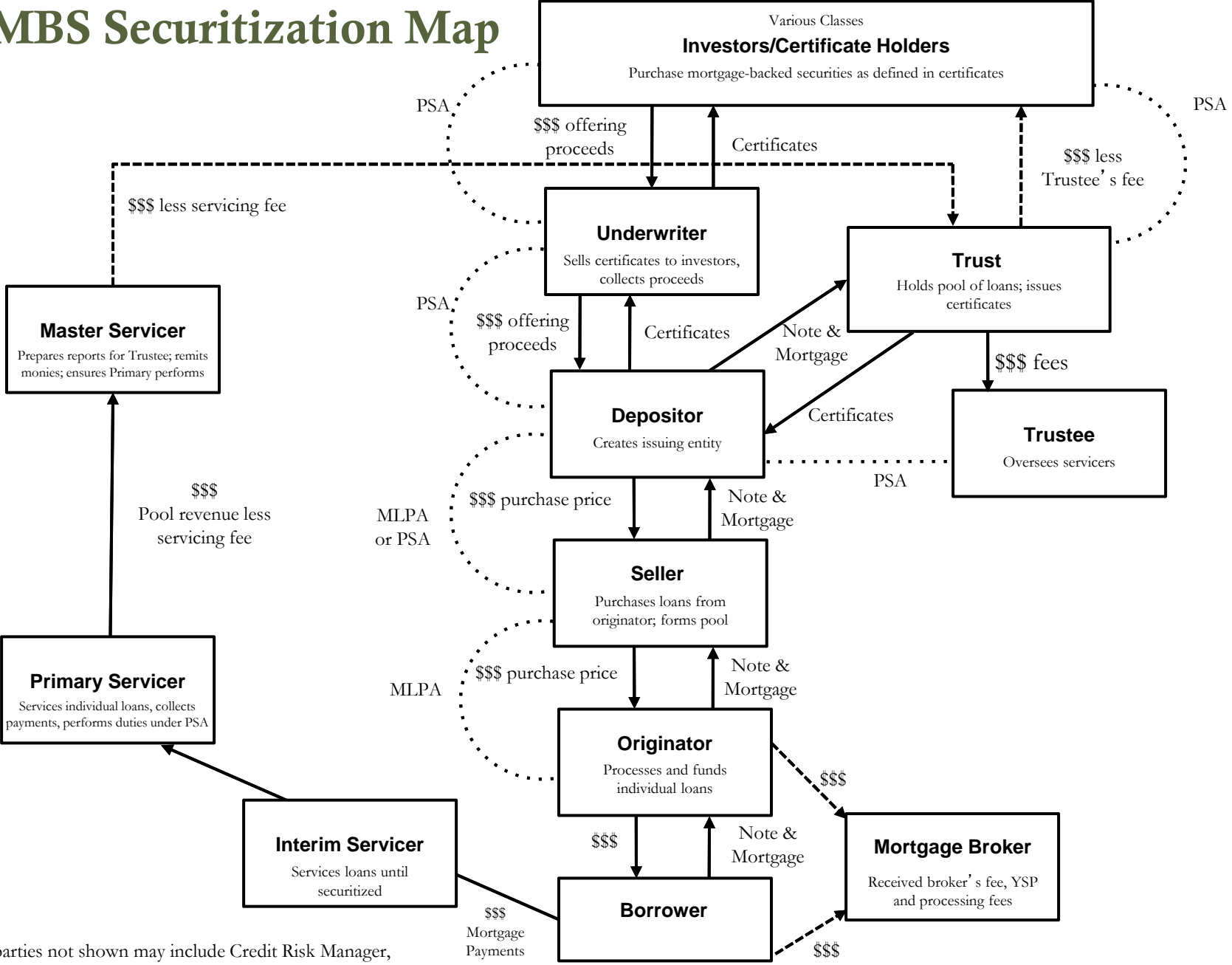
\$\$\$



Note & Mortgage

Borrower

RMBS Securitization Map



Other parties not shown may include Credit Risk Manager, Securities Administrator, Swap Counterparty, and Rating Agencies

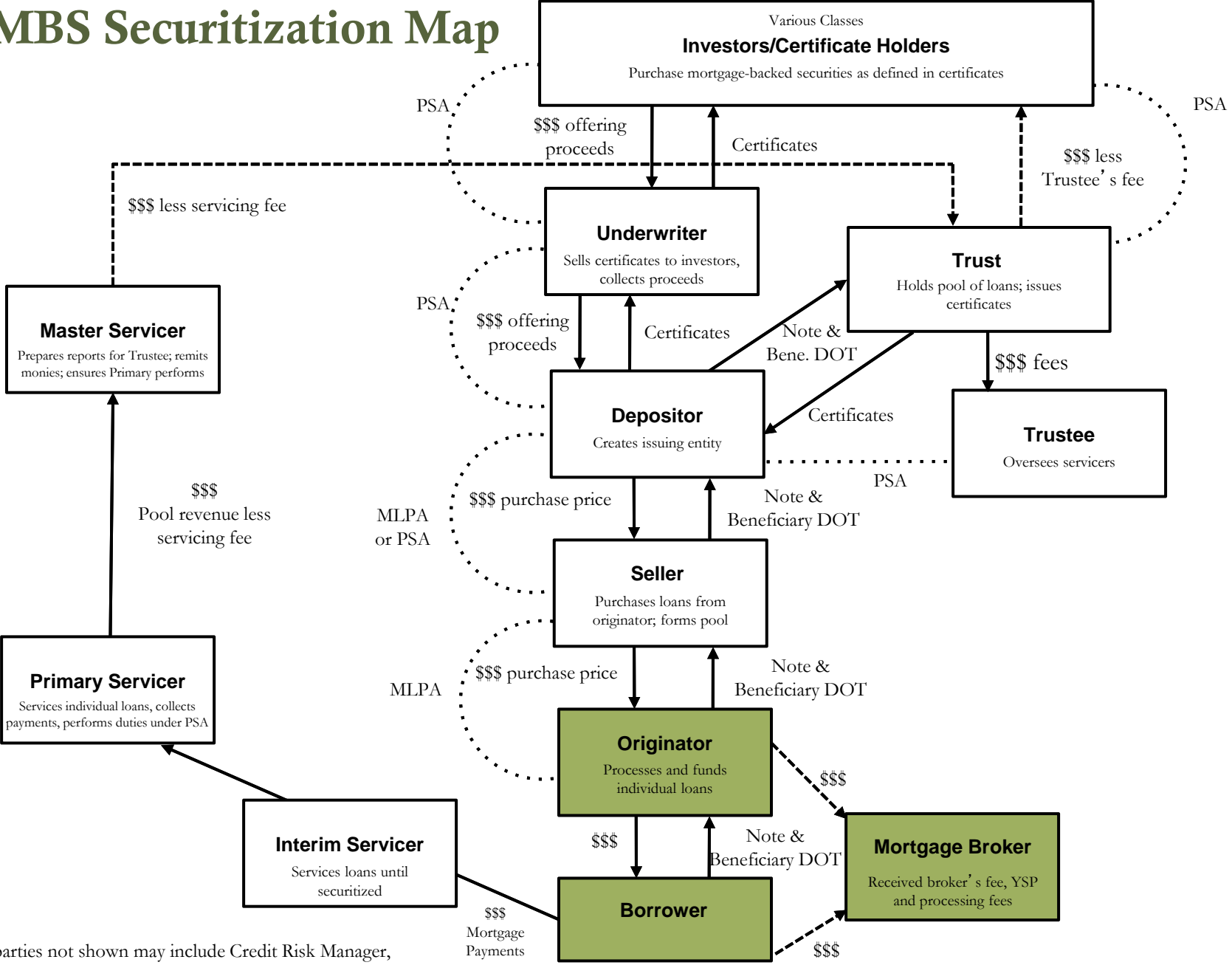
In re Vasquez,
228 Ariz. 357, 266 P.3d 1053 (2011)

Hogan v. Wash. Mut. Bank, N.A.,
230 Ariz 584, 277 P.3d 781 (2012)

Steinberger v. McVey ex rel. Co. of Maricopa, et al.
234 Ariz. 125, 318 P.3d 419
(Ariz. App. Div. 2014)

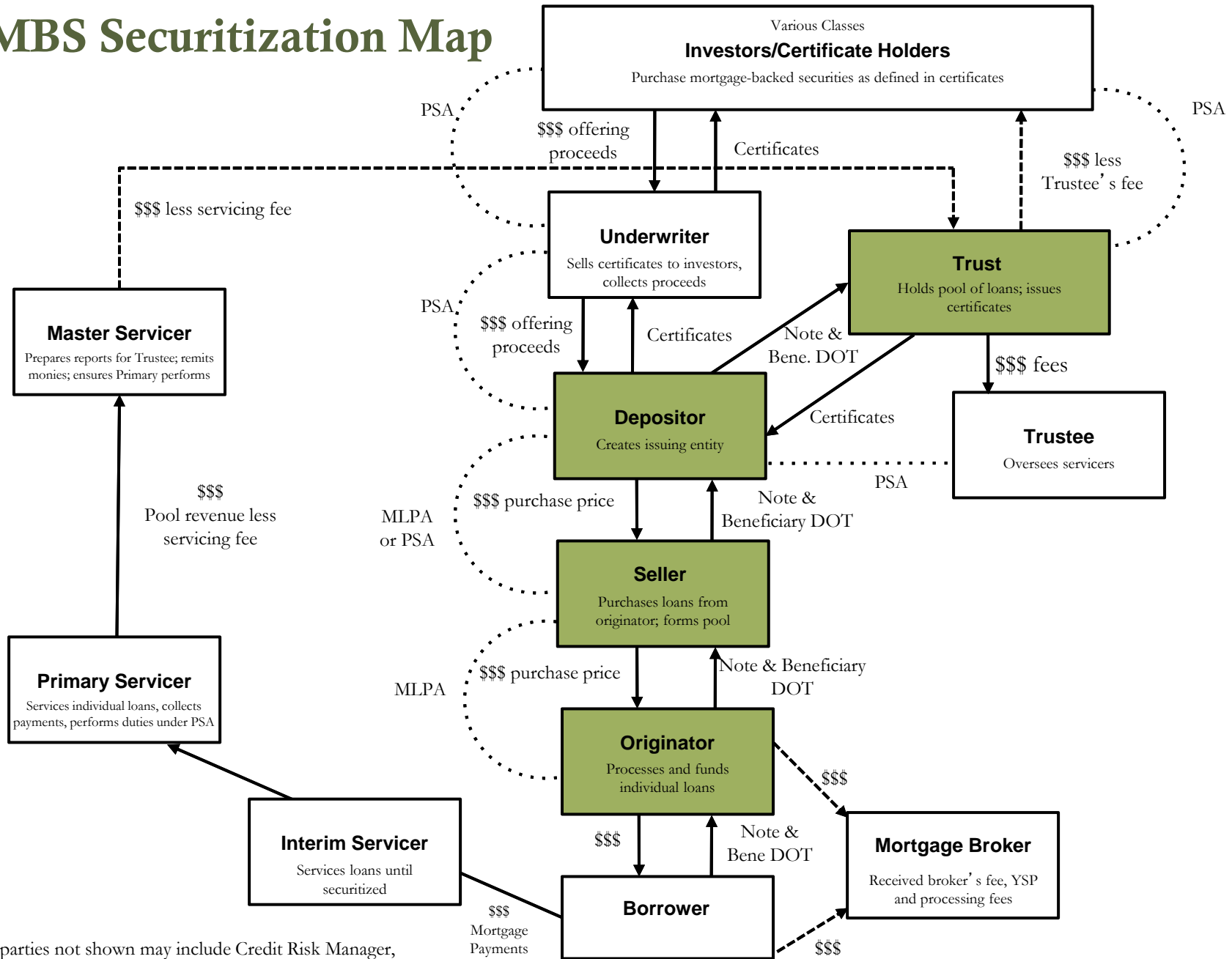
Moving Mortgage Loans

RMBS Securitization Map



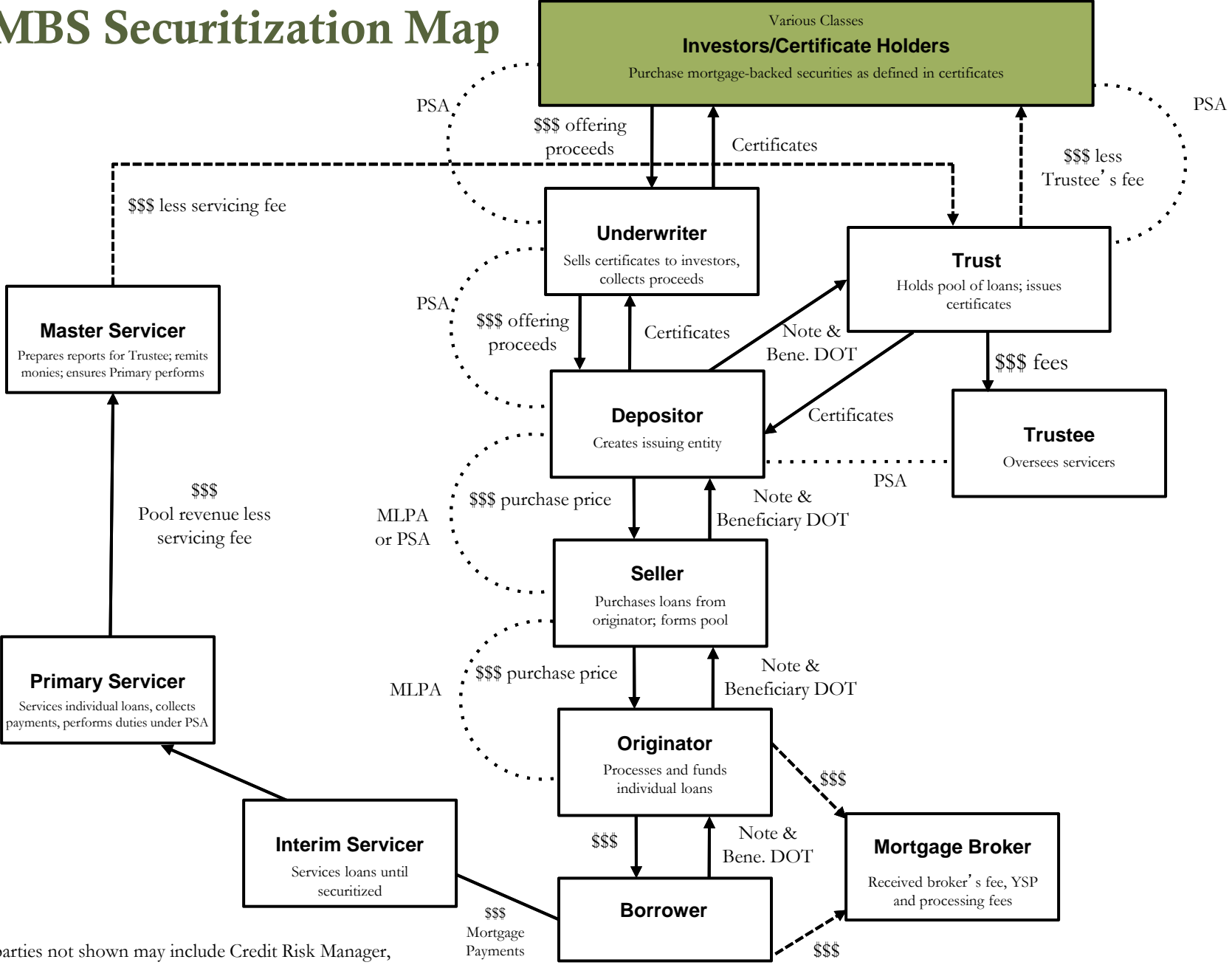
Other parties not shown may include Credit Risk Manager, Securities Administrator, Swap Counterparty, and Rating Agencies

RMBS Securitization Map



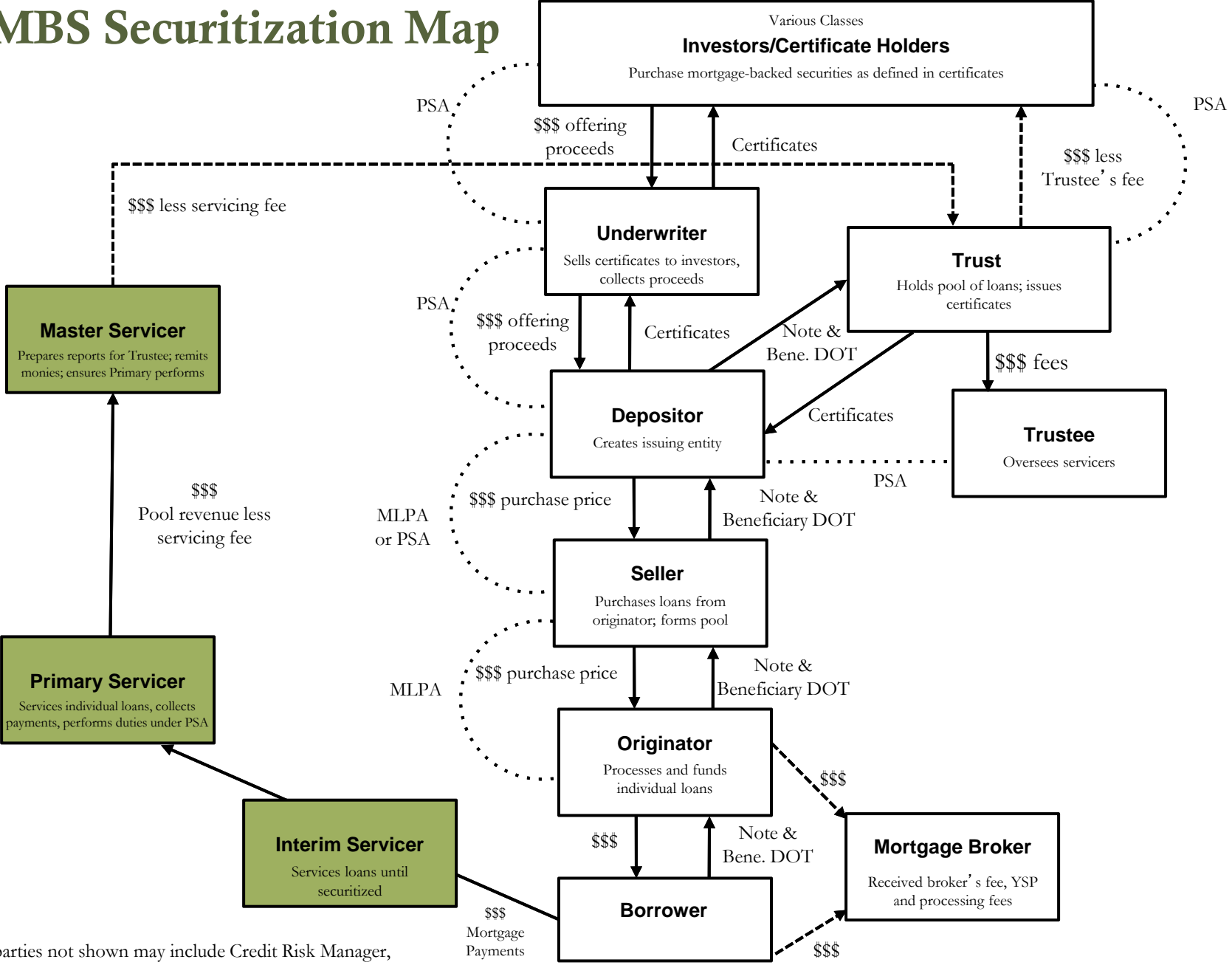
Other parties not shown may include Credit Risk Manager, Securities Administrator, Swap Counterparty, and Rating Agencies

RMBS Securitization Map



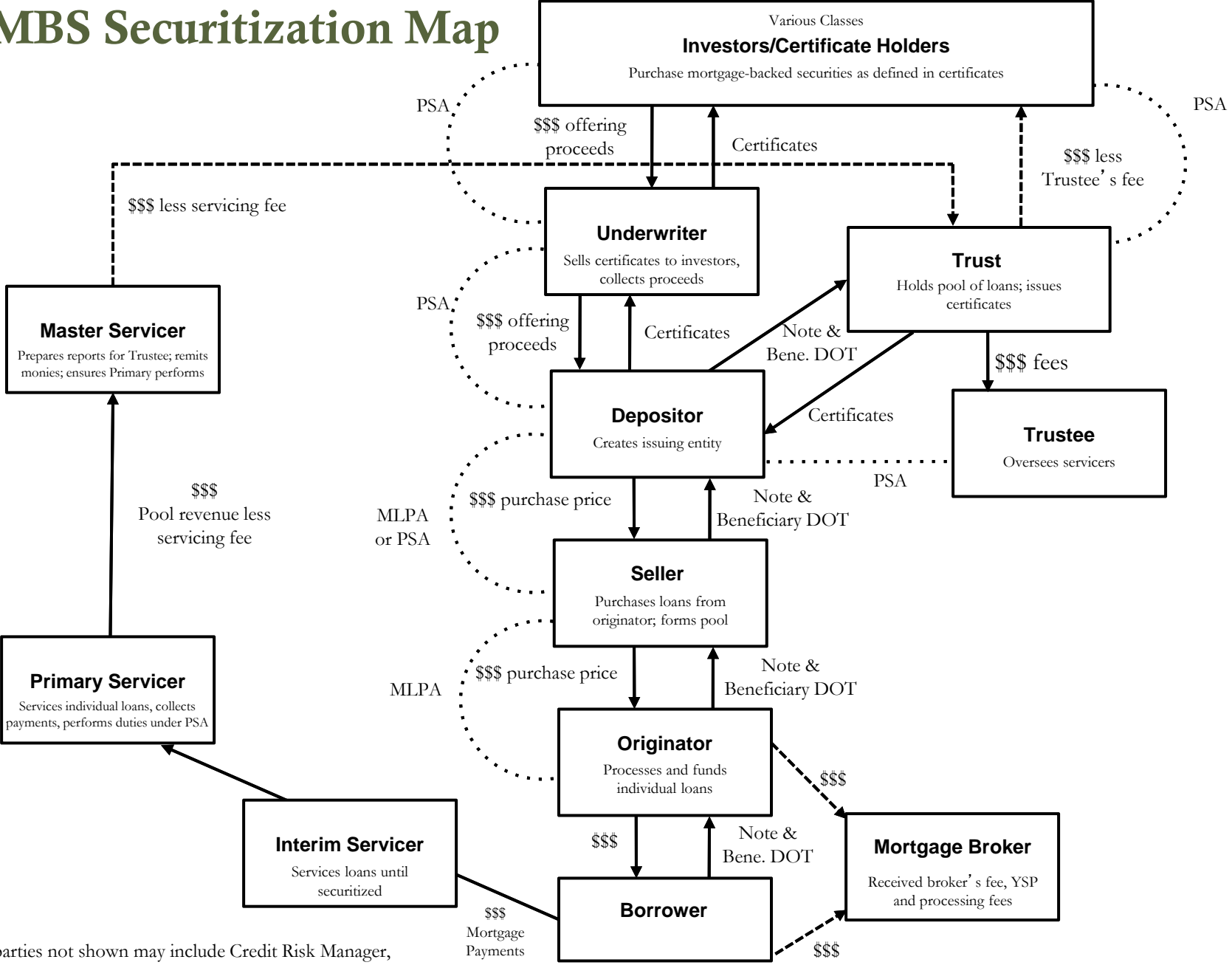
Other parties not shown may include Credit Risk Manager, Securities Administrator, Swap Counterparty, and Rating Agencies

RMBS Securitization Map



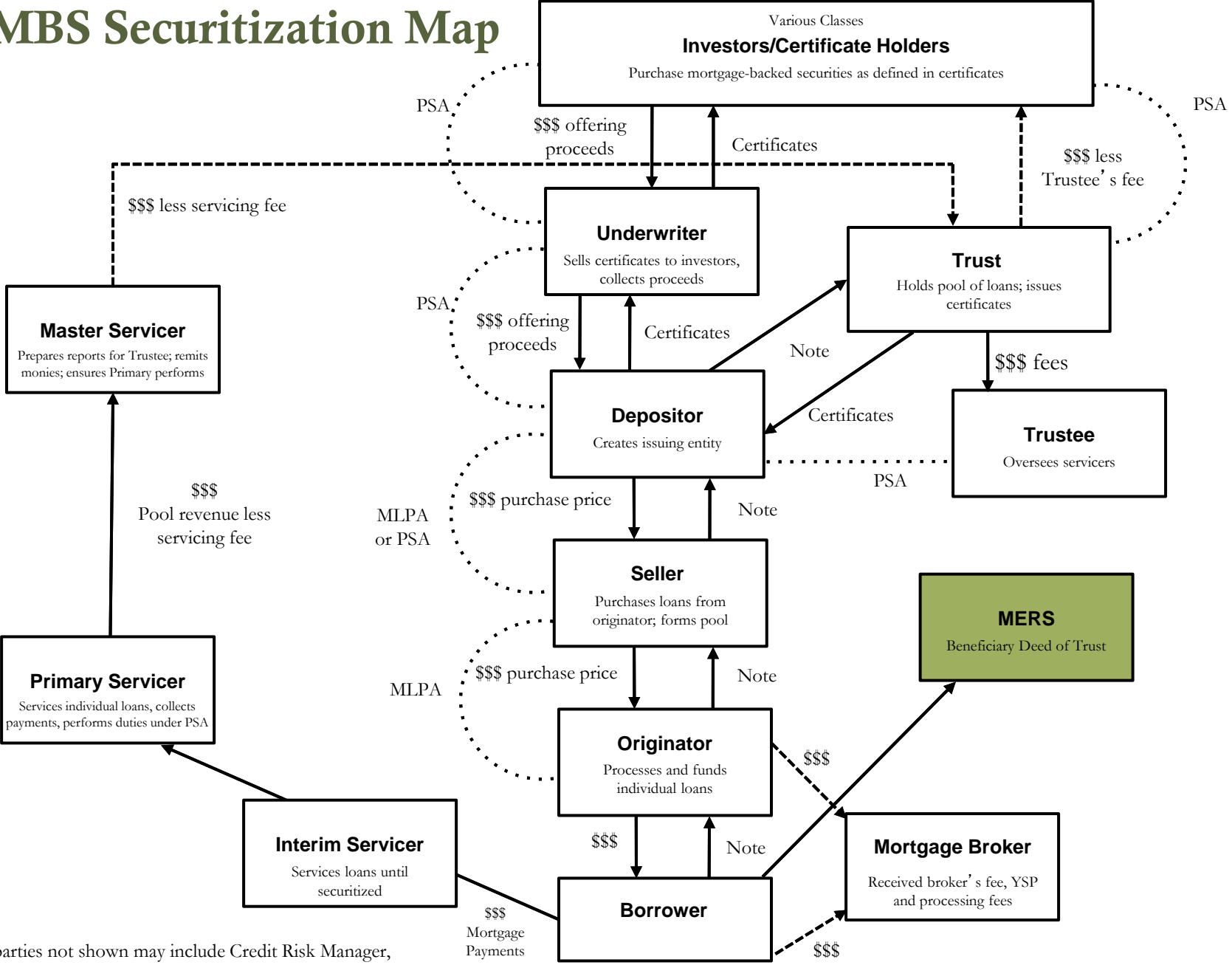
Other parties not shown may include Credit Risk Manager, Securities Administrator, Swap Counterparty, and Rating Agencies

RMBS Securitization Map



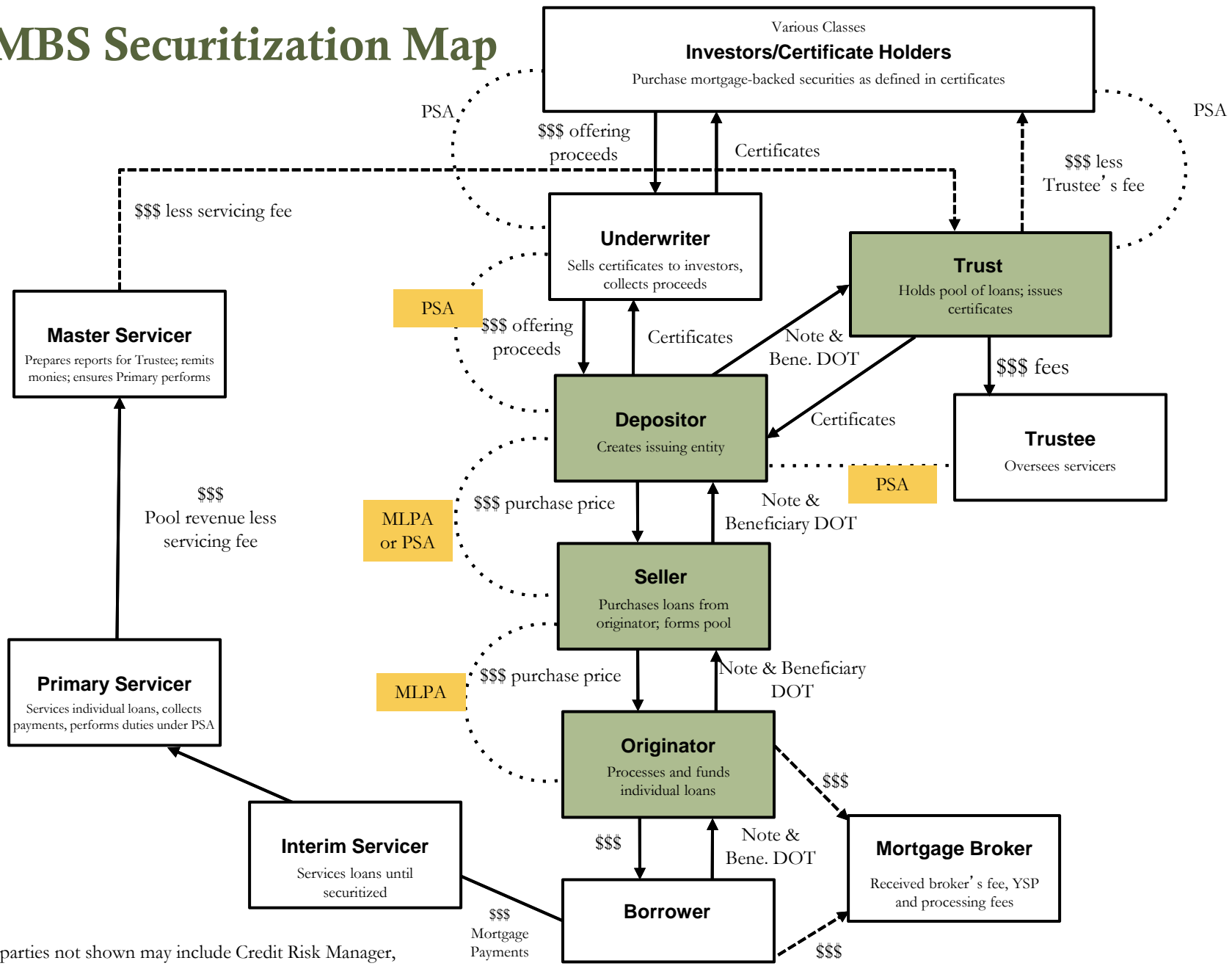
Other parties not shown may include Credit Risk Manager, Securities Administrator, Swap Counterparty, and Rating Agencies

RMBS Securitization Map



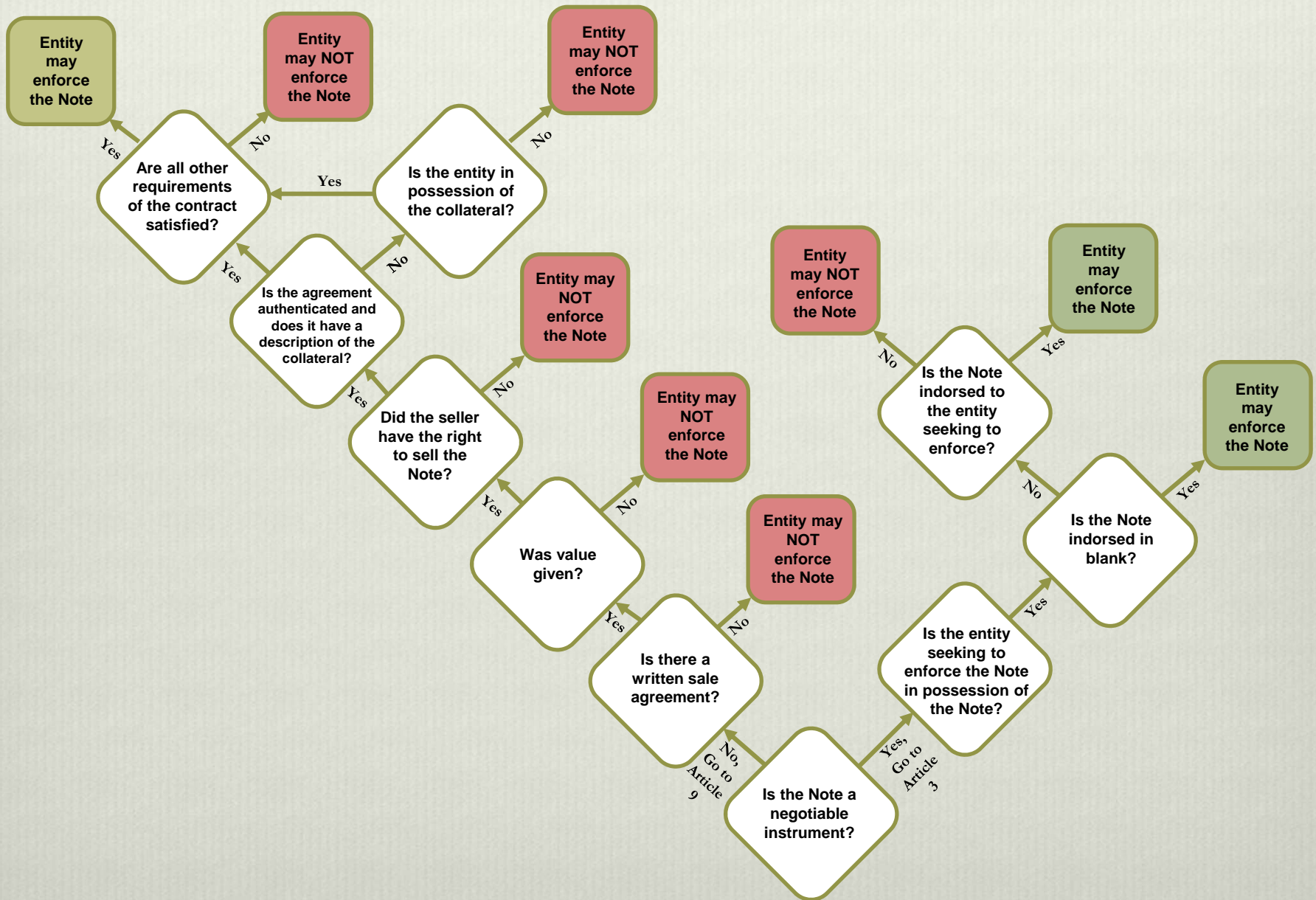
Other parties not shown may include Credit Risk Manager, Securities Administrator, Swap Counterparty, and Rating Agencies

RMBS Securitization Map

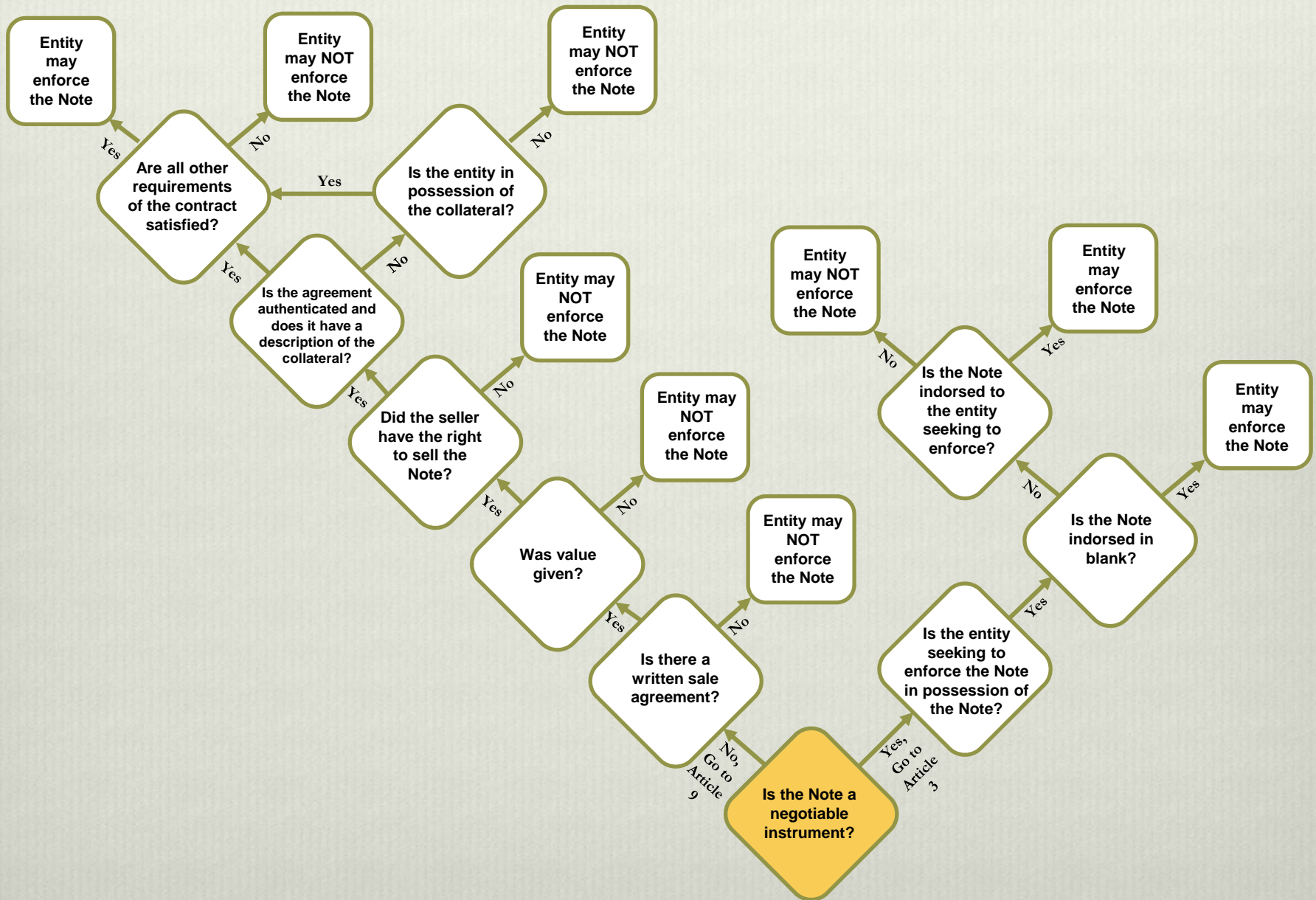


Other parties not shown may include Credit Risk Manager, Securities Administrator, Swap Counterparty, and Rating Agencies

ARTICLES 3 & 9 FLOW CHART



ARTICLES 3 & 9 FLOW CHART





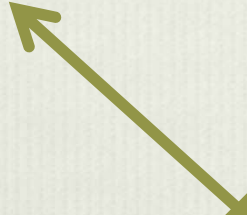
**Is the Note a
negotiable
instrument?**

What is a negotiable instrument?

- ❖ **Defined in UCC § 3-104**
- ❖ **Unconditional promise to pay a fixed amount of money, with or without interest**
- ❖ **Must be payable to bearer or order**
- ❖ **Payable on demand or at a definite time**
- ❖ **Does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money.**

No, go to
Article 9

**Is the Note a
negotiable
instrument?**



The Sale of Promissory Notes Under Article 9

Article 9 – Secured Transactions

- ❖ **Scope § 9-109(a)(3)**
- ❖ **Covers the sale of accounts, chattel paper, payment intangibles and promissory notes as well as traditional security interests.**
- ❖ **A debtor that has sold an account, chattel paper, payment intangible, or promissory note does not retain a legal or equitable interest in the collateral sold. § 9-318.**
- ❖ **The “debtor” in Article 9 language includes the seller of promissory notes. § 9-102(a)(28).**

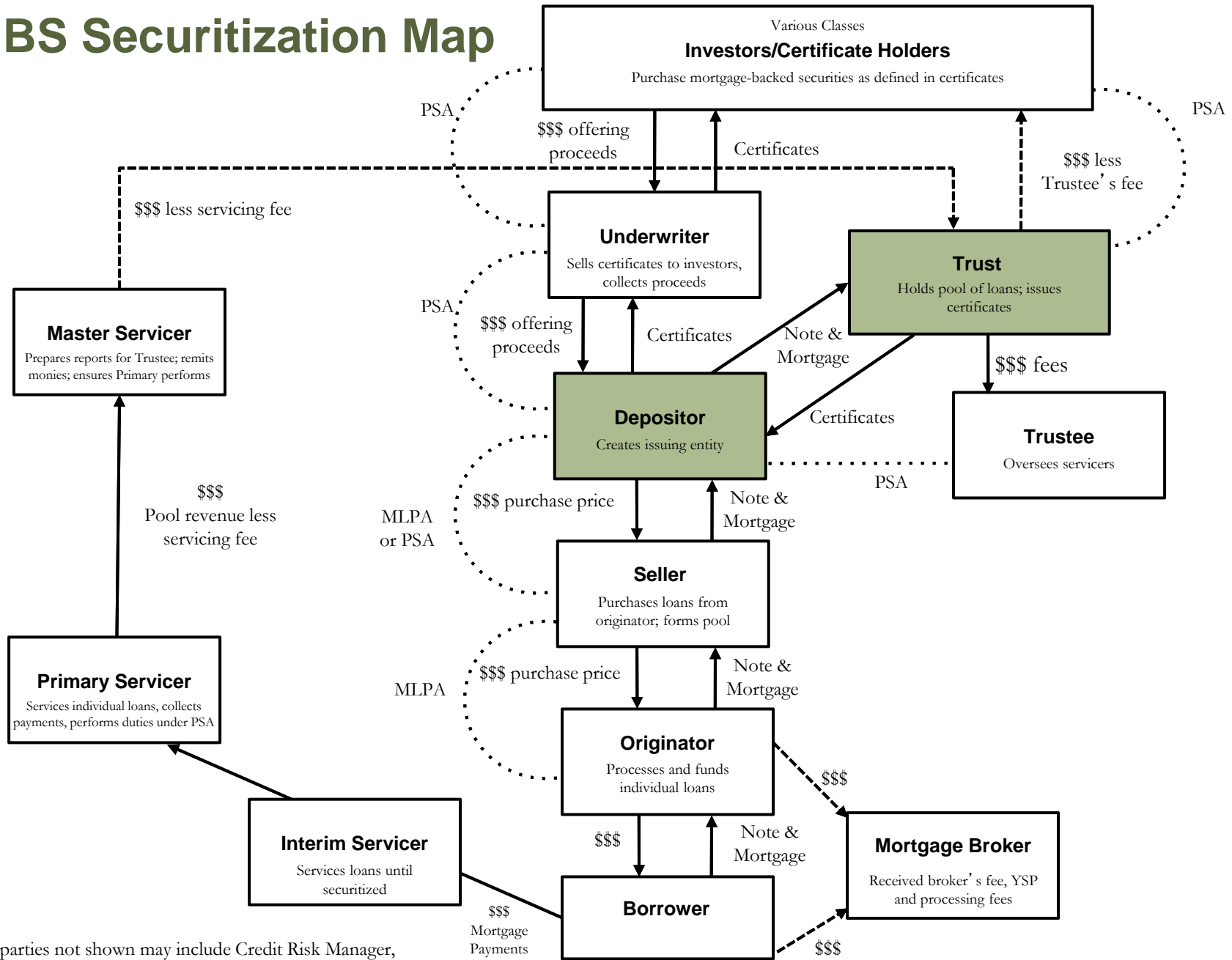
Article 9 – Secured Transactions

- ❖ **§ 9-203(b): A security interest is enforceable against the debtor when:**

Article 9 – Secured Transactions

- ❖ **§ 9-203(b): ~~A security interest~~ The sale of notes is enforceable against the ~~debtor~~ seller when:**

RMBS Securitization Map

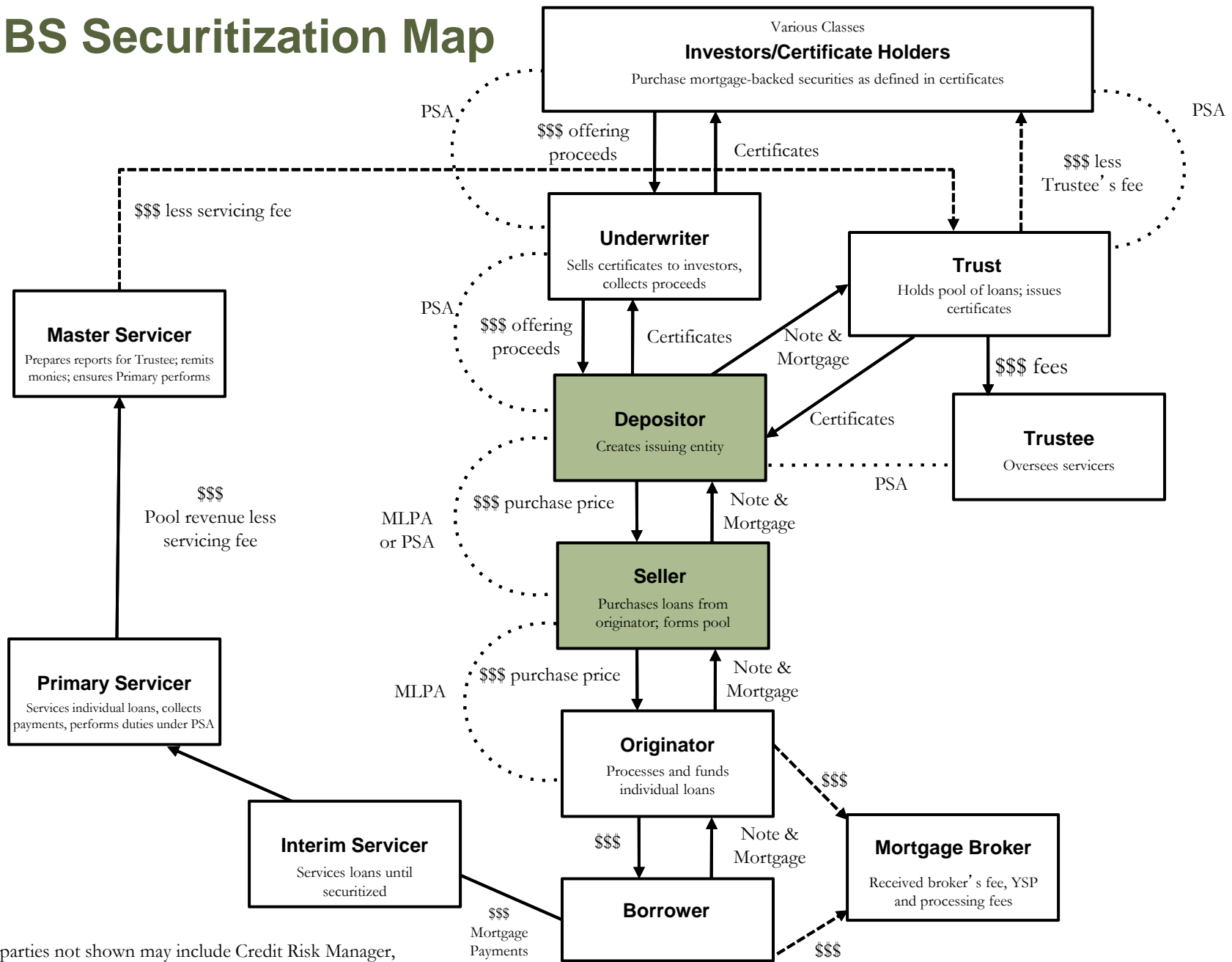


Other parties not shown may include Credit Risk Manager, Securities Administrator, Swap Counterparty, and Rating Agencies

Article 9 – Secured Transactions

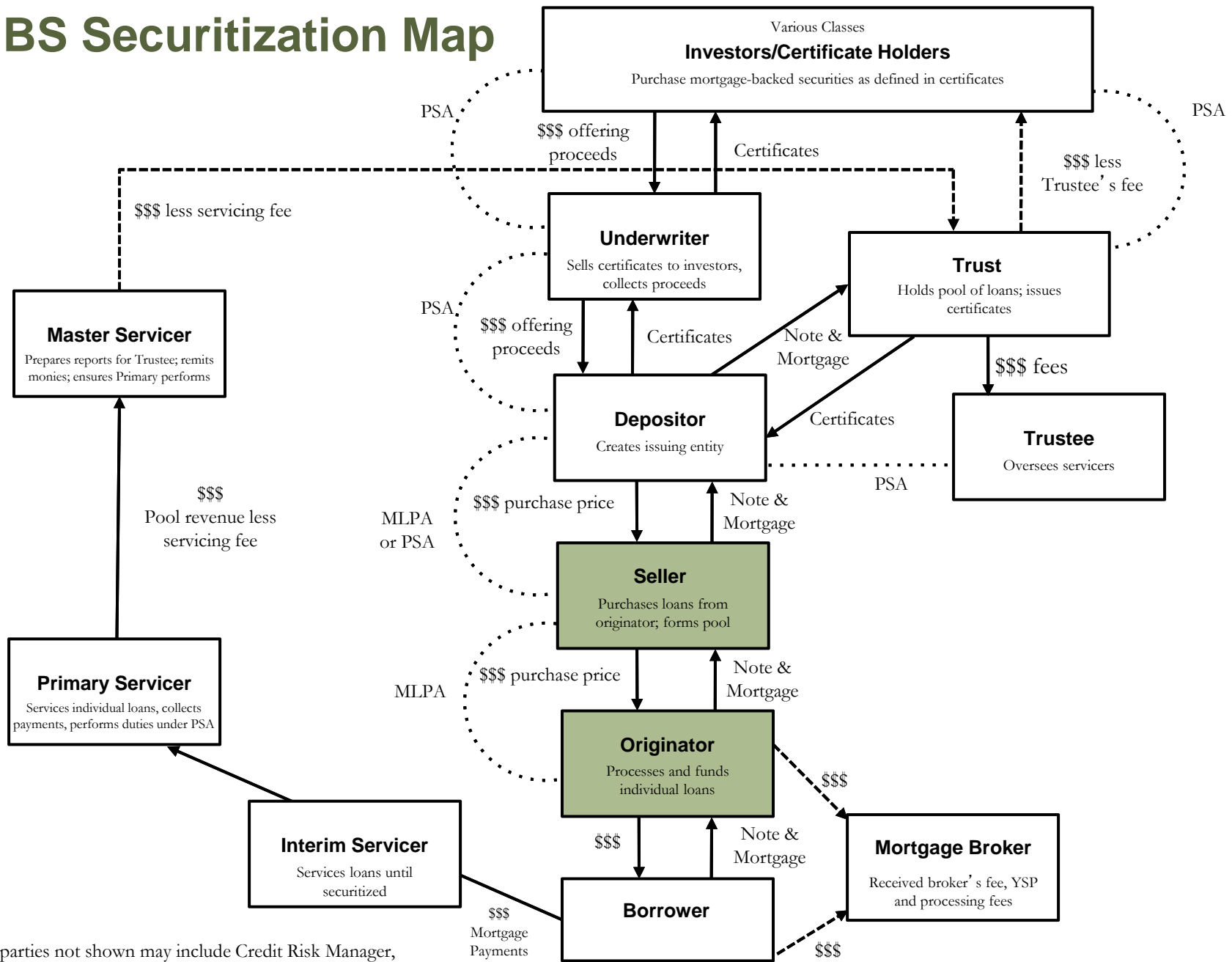
- ❖ **§ 9-203(b): ~~A security interest~~ The sale of notes is enforceable against the ~~debtor~~ seller when:**
 - ❖ **Value has been given**
 - ❖ **Seller has rights (or the power to transfer rights) in the collateral/notes**

RMBS Securitization Map



Other parties not shown may include Credit Risk Manager, Securities Administrator, Swap Counterparty, and Rating Agencies

RMBS Securitization Map



Other parties not shown may include Credit Risk Manager, Securities Administrator, Swap Counterparty, and Rating Agencies

Article 9 – Secured Transactions

- ❖ **§ 9-203(b): ~~A security interest~~ The sale of notes is enforceable against the ~~debtor~~ seller when:**
 - ❖ **Value has been given**
 - ❖ **Seller has rights (or the power to transfer rights) in the collateral/notes**
 - ❖ **Either of the following conditions is met:**
 - ❖ **Seller has authenticated a security agreement that provides a description of the collateral,**

Article 9 – Secured Transactions

- ❖ **§ 9-108: addresses the sufficiency of the “description” of the “collateral,” i.e., the promissory notes being sold.**
- ❖ **General standard (§ 9-108 (a)): description must “reasonably” identify the loan notes. Examples of reasonable identification include: 1) a specific listing; 2) by category; 3) by “type”; or 6) any other method if the identity of the collateral is “objectively determinable.” § 9-108(b).**
- ❖ **“Supergeneric” descriptions not sufficient, e.g., “all of the seller’s loans.” § 9-108(c).**

Schedule I

MORTGAGE LOAN SCHEDULE
(by Loan Group)

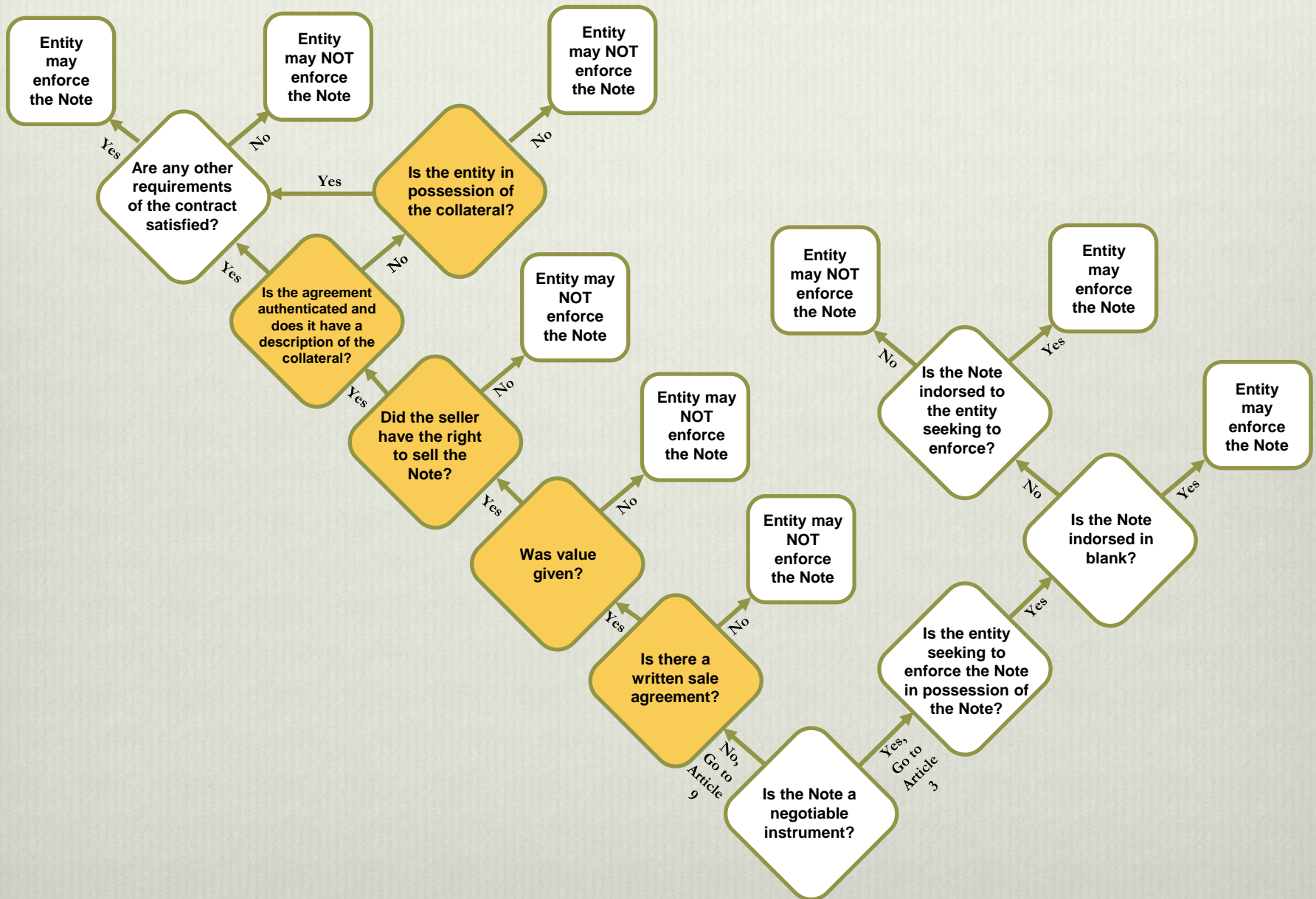
--

!!!!#

Article 9 – Secured Transactions

- ❖ **§ 9-203(b): ~~A security interest~~ The sale of notes is enforceable against the ~~debtor~~ seller when:**
 - ❖ **Value has been given**
 - ❖ **Seller has rights (or the power to transfer rights) in the collateral/notes**
 - ❖ **Either of the following conditions is met:**
 - ❖ **Seller has authenticated a security agreement that provides a description of the collateral, OR**
 - ❖ **Buyer has possession of the collateral**

ARTICLES 3 & 9 FLOW CHART



Art. 9: Mortgage Follows the Note

- ❖ **§ 9-203(g):** The attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage, or other lien.
- ❖ **§ 9-203(a):** Security interest/sale attaches when the security/sale agreement becomes enforceable
- ❖ **§ 9-203(b):** Security/sales agreement becomes enforceable when value is given, debtor/seller has right to transfer collateral, and either authenticated agreement with description of collateral or possession.


Restatement (Third) Property (Mortgages)

§ 5.4 : Transfer of Mortgages and Obligations Secured by Mortgages

- (a) A transfer of the obligation secured by the mortgage also transfers the mortgage, unless parties agree otherwise.
- (b) Except as otherwise provided by the UCC, a transfer of the mortgage also transfers the obligation, unless the parties agree otherwise.
- (c) A mortgage may be enforced only by, or on behalf of, a person who is entitled to enforce the obligation.

Relevant State Statutes

- ❖ States may require that an assignment of the mortgage be recorded before one can enforce the mortgage. Examples of these states are California (but see *Calvo*, 130 Cal. Rptr. 3d 815 (Cal. Ct. App. 2011)) and Georgia.
- ❖ If so, this requirement arguably trumps the “mortgage-automatically follows note” doctrine and vests the note holder (or the party with the right to enforce the note) with authority to foreclose only when the mortgage assignment is recorded.
- ❖ Other restrictions in your state’s law?



**Are all other
requirements of
the agreement
satisfied?**

Other requirements?

- ❖ **Parties can contract around Article 9 provisions, with limited exception - Revised § 1-302 (but cannot contract around definitions in Articles 3 and 9—see below).**
- ❖ **Does the Pooling and Servicing Agreement or Mortgage Loan Purchase Agreement create additional requirements in order to transfer the note?**

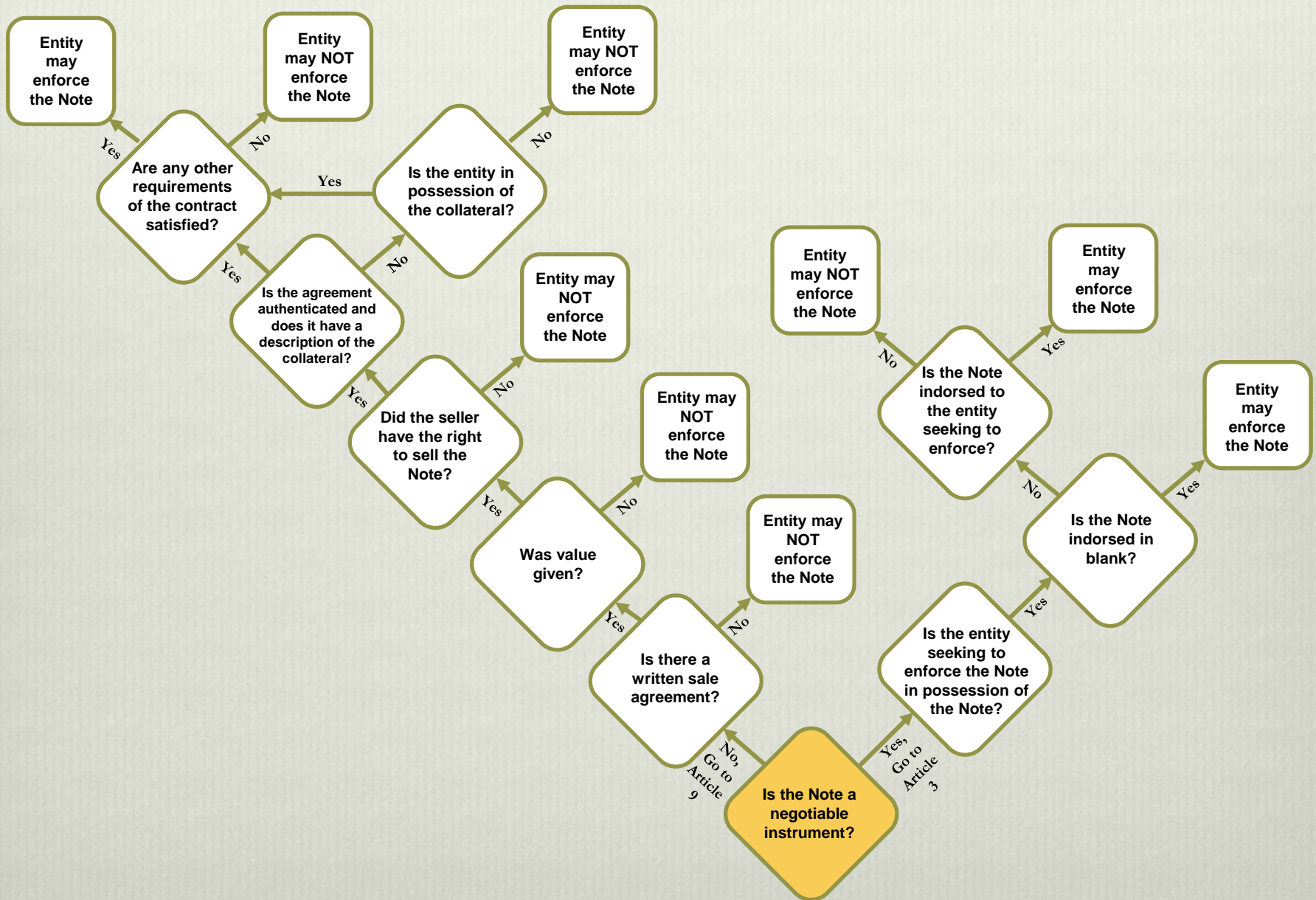
Other requirements?

- ❖ **Transfer provisions in the PSA (usually ¶ 2.01) or the MLPA contain two parts:**
 - ❖ **1. Seller “hereby” sells, assigns, etc. mortgage loans to trust/issuer, AND**
 - ❖ **2. “in connection with” this sale there will be a specified action with respect to the notes and/or mortgages**

Other requirements?

- ❖ For example, notes will be “endorsed either (A) in blank, in which case the Trustee shall cause the endorsement to be completed or (B) in the following form: “Pay to the order of [Trustee], as Trustee, without recourse...”
- ❖ “A complete unbroken chain of endorsements” from originator to the depositor, and then in blank (to be filled in) or special endorsement to the trust...
- ❖ “An original assignment. The Mortgagee shall be assigned either (A) in blank or (B) to [Trustee], as Trustee, without recourse...”
- ❖ “An original of any intervening assignment of Mortgage showing a complete chain of assignments...”

ARTICLES 3 & 9 FLOW CHART

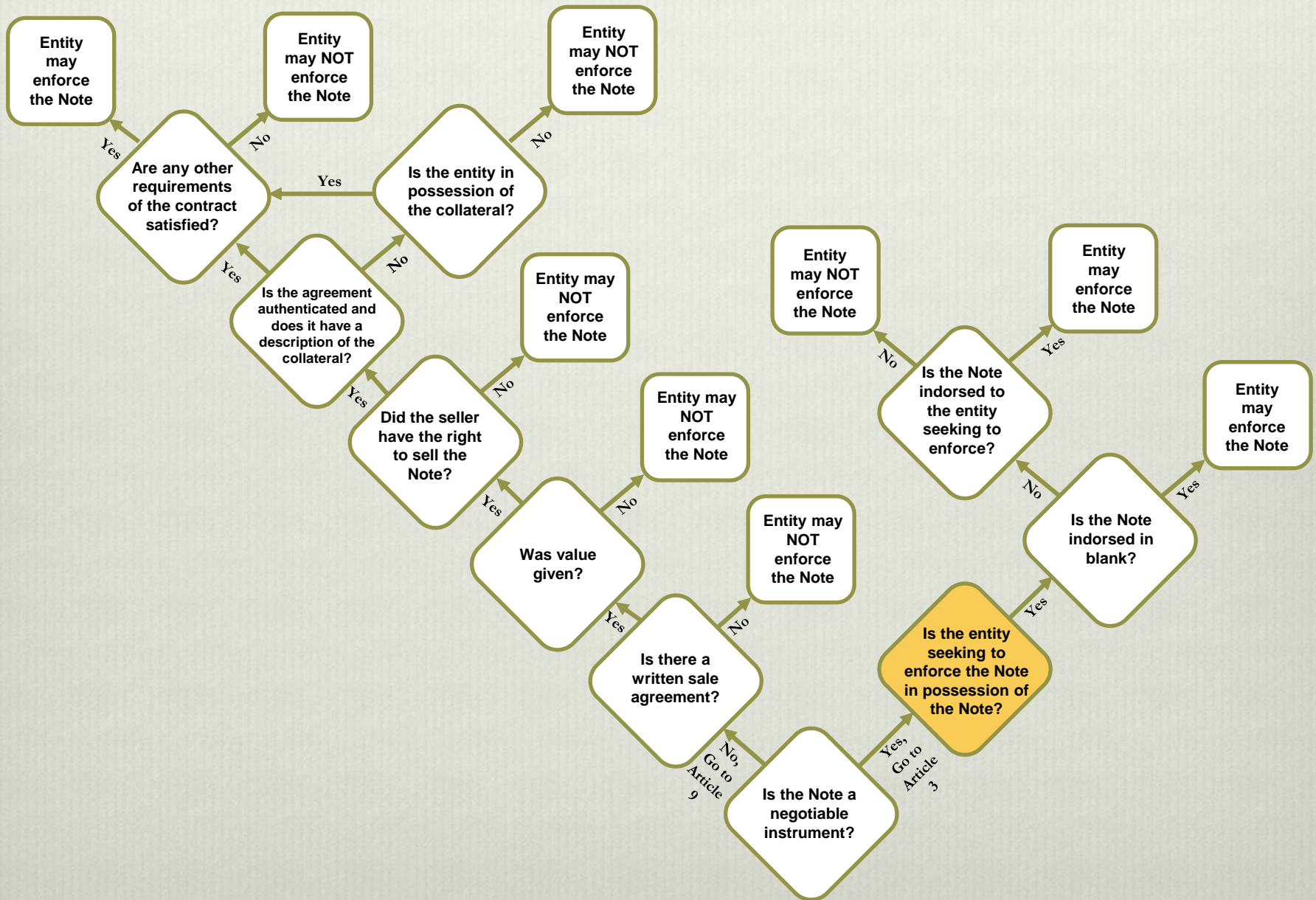


**Is the Note a
negotiable
instrument?**

**Yes, go to
Article 3**

Negotiable Instruments

ARTICLES 3 & 9 FLOW CHART



Negotiation

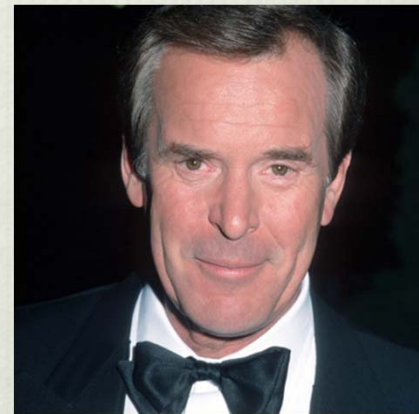
- ❖ § 3-201(a): “Negotiation” means a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder
- ❖ § 3-201(b): Except for negotiation by remittur, if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder. If an instrument is payable to bearer, it may be negotiated by transfer of possession alone.

Non-“Negotiation” Transfers

- ❖ § 3-203(a): An instrument is transferred when it is delivered for the purpose of giving the transferee the right to enforce the instrument.
- ❖ § 3-203(b): Regardless of whether the transfer is a “negotiation,” a transfer vests in the transferee any right of the transferor to enforce the instrument.
- ❖ Comment 2: “Because the transferee’s rights are derivative of the transferor’s rights, those rights must be proved.”



Who is
PETE?



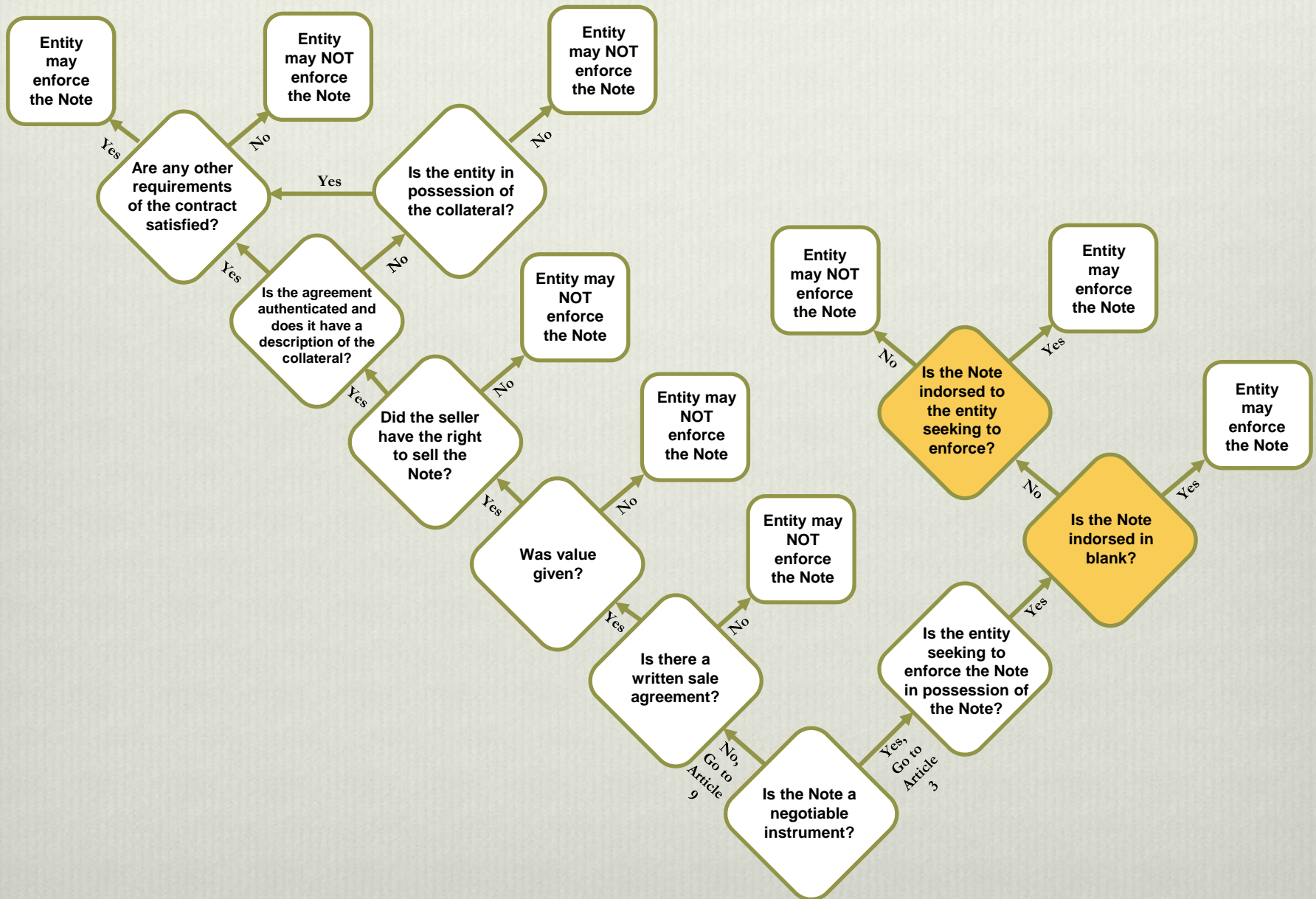
Person Entitled to Enforce

- ❖ **§ 3-301: “Person entitled to enforce” an instrument means**
 - ❖ **(i) the holder of the instrument;**
 - ❖ **(ii) a nonholder in possession of the instrument who has the rights of a holder, or**
 - ❖ **(iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 3-309 or 3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.**

Holder

- ❖ **Revised § 1-201(a)(21): “Holder” means:**
 - (A) the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession**

ARTICLES 3 & 9 FLOW CHART



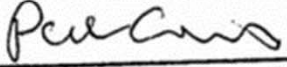
PAY TO THE ORDER OF
WITHOUT RECOURSE
FLAGSTAR BANK, FSB

BY: 
JEAN R. GARFOCK, SENIOR VICE PRESIDENT

BY: 
JOHN P. MAFIECKI, FIRST VICE PRESIDENT

PAY TO THE ORDER OF
Flagstar Bank, FSB
WITHOUT RECOURSE

Florida Home Equity LLC

By: 
Paul Coopersmith
Loan Operations Associate

Indorsements and Allonges

- ❖ **Indorsements are required to transfer loan notes that are payable to an identified person until the payee (lender) or a subsequently identified person indorses in blank or to bearer. § 3-201(b) (negotiation); § 3-109 (payable to bearer or order); § 3-205 (special indorsement; blank indorsement).**
- ❖ **Indorsements must appear on the note but can appear on a paper (allonge) “affixed to the instrument.” § 3-204(a). (Note: NY UCC § 3-202(2) still says “firmly affixed”).**

Proof of the Rights of the Transferor

- ❖ **When the transferee is not a “holder,” the transferor must have been a holder at the time of transfer. § 3-203, Comment 2.**
- ❖ **When the note is not payable to the transferee, the transferee must account for possession of the unindorsed note by proving the transaction through which the transferee acquired it. § 3-203, Comment 2.**

Other Requirements

- ❖ Can the PSA vary the requirements of Article 3?
- ❖ A PSA cannot change the definitions included in the UCC. Revised § 1-302, Comment 1. This Comment specifically mentions the definitions of “negotiation,” “negotiable instrument,” and “holder-in-due-course.”

The Relationship Between Article 3 and Article 9

Relationship between Article 9 and Article 3

- ❖ § 3-102: If there is a conflict between this Article and Article 4 or 9, Articles 4 or 9 govern.
- ❖ § 9-331: This article does not limit the rights of a holder in due course of a negotiable instrument...These holders or purchasers take priority over an earlier security interest, even if perfected, to the extent provided in Articles 3, 7, and 8.
- ❖ A word about § 9-601, *et seq.*

More on the Relationship between Article 9 and Article 3

- ❖ § 9-308, Comment 6 - For example, if the obligation is evidenced by a negotiable note, then Article 3 dictates the person whom the maker must pay to discharge the note and any lien securing it.
- ❖ § 9-607, Comment 8 (“Of course, the secured party’s rights derive from those of its debtor. Subsection (b) would not entitle the secured party to proceed with a foreclosure unless the mortgagor also were in default or the debtor (mortgagee) otherwise enjoyed the right to foreclose.”).

More on the Relationship between Article 9 and Article 3

- ❖ § 3-602(a) (“[A] [negotiable] instrument is paid to the extent payment is made by or on behalf of a party obligated to pay the instrument, and to a person entitled to enforce the instrument.”)
- ❖ § 3-301 (defining under what circumstances a person is entitled to enforce an instrument)

Other Article 9 and Article 3 Issues

- ❖ **Article 9 addresses the rights of the parties to the security agreement. It does not tell us who can enforce a negotiable instrument, which is an agreement between the obligor and payee (and subsequent persons entitled to enforce)**
- ❖ **Are we enforcing the Pooling and Servicing Agreement?**
- ❖ **Does the borrower get a free house if there is a problem with the ownership of the note?**

Just a Reminder

- Please fill out the evaluation when you sign-out
- I will email you the PowerPoint and recording in a few days
- Thank you to our speaker!



Since 1969, the nonprofit **National Consumer Law Center® (NCLC®)** has worked for consumer justice and economic security for low-income and other disadvantaged people, including older adults, in the U.S. through its expertise in policy analysis and advocacy, publications, litigation, expert witness services, and training. www.nclc.org