The Mythology of HR 4323, the Consumer Mortgage Choice Act

H.R. 4323 promises to do three things to Dodd-Frank: (1) adjust the definition of mortgage broker compensation under Dodd-Frank to exempt payments made to employees of the mortgage loan originator; (2) exclude fees paid to the creditor or an affiliate of the creditor under affiliated business relationships; and (3) exclude fees for title insurance from the calculation of points and fees even if the charge is *per se* unreasonable, wholly retained by the creditor, or an illegal fee.

The bill is sponsored by Representative Bill Huizenga and is co-sponsored by 14 other representatives, but each on the misguided premise that the bill is good for small businesses – it's not – and good for consumers – again, it's not. H.R. 4323 rewards the largest affiliated service providers in the United States at the expense of real competition in the settlement services industry and at the expense of consumer choice. H.R. 4323 prejudicially predetermines outcomes in the settlement services industry. It picks winners and losers among service providers. H.R. 4323 makes it less likely that consumers will have real choices when it comes to who will independently look out for a consumer's interests at the closing table. Here are some other problems and myths with the measure:

Myth #1: HR 4323 will "level the playing field" between affiliated business arrangements and independent settlement service providers.

The Facts: Affiliated business arrangements (AfBAs) are businesses in the real estate settlement services industry that are created to provide kickbacks and referral payments to lenders, mortgage companies, real estate firms and homebuilders. AfBAs do not compete on price or service. Instead, business within an AfBA is predicated upon referral payments between co-owners as a means of incentivizing the referral, not the service or price of the product. Customers rarely choose settlement providers – referral sources who run the AfBAs do the selection. AfBAs limit consumer choice by restricting consumer access to non-referral source competition, such as independent settlement providers. Congress correctly understood these inequities when drafting Dodd-Frank. HR 4323 actually does the opposite of its proponents' promise: it slants the playing field toward the referral sources and their AfBAs to the exclusion of consumer choice and competitive equity on the part of independent settlement providers.

Myth #2: There is little difference between an affiliated provider of services and an independent provider of services because everyone charges the same title insurance rate.

The Facts: Six states have no title insurance rate system. The other 44 states have varying rate rules based upon state-specific market data. The heart of all title insurance is the title search. Since 2000, national title insurance underwriters have lowered their title search standards to permit non-traditional title searches in all areas of the United States. In that same period, claims and loss ratios have risen to historic proportions – now well over 10% of gross premiums. As search standards have declined, there has been no corresponding decrease in premiums despite the fact that consumers are now getting less than what they think they paid for, i.e. a full and complete title search. Affiliated providers and their referral sources have requested the lesser searches as a complement to their title insurance product in order to increase their profit. Because of these facts, a premium rate charged by an affiliate is not necessarily the same as that charged by a non-affiliate.

Myth #3: Consumers prefer the services of AfBAs over independent providers.

The Facts: The Harris Interactive Surveys cited by NAR, RESPRO and others in their support of HR 4323 are deeply flawed surveys. First, there was no margin for error in any of the surveys because all of the survey respondents were former clients of the AfBAs who were solicited post-transaction to provide feedback concerning their experience. There were no controls for these solicitations and the results lack any substantive merit.

Second, over 70% of the respondents in the flawed surveys responded by stating that they were “not at all” familiar with an affiliated business arrangement or “one stop” shop. In other words, the consumers who closed with the AfBA had no idea what the AfBA was about or why.

Finally, 80% of the 2008 survey respondents did not prefer to use an AfBA! That number is not an opponent’s view of the survey. That is the actual response given by former clients of AfBAs who were solicited by referral sources to provide their input! The truth is that consumers do not understand what an AfBA is and certainly do not prefer them to non-affiliated entities. The Harris polls clearly indicate that, even when the survey is titled in favor of affiliates, the respondents do not prefer AfBAs or “one stop” shops. In light of these facts, proponents of the survey no longer even post the results or findings for public review.

H.R. 4323 is not good policy for small business or consumers. It benefits the largest referral source affiliates at the expense of price and service competition. H.R. 4323 also obscures the fact that AfBAs promote deep-rooted conflicts of interest in the settlement process. NAILTA urges you and the rest of Congress to oppose H.R. 4323. For more information about NAILTA, please visit our website at www.nailta.org.