



NAILTA Supports the 21st Century Glass-Steagall Act: H.R. 3711 and S. 1282

Congress has introduced two pieces of bipartisan legislation known as the 21st Century Glass-Steagall Act – H.R. 3711 (co-sponsored by Rep. John Tierney (D-MA) and Walter Jones (R-NC)) and S. 1282 (co-sponsored by Sen. Elizabeth Warren (D-MA) and John McCain (R-AZ)) in an effort to reduce risks to the financial system by limiting banks' ability to engage in certain risky activities and limiting conflicts of interest as well as reinstating certain Glass-Steagall Act protections that were previously repealed in 1999 by the Gramm-Leach-Bliley Act (GLB).

Background of Legislation Prior to Today:

In response to the financial crisis known as the Great Depression in the 1930's, Congress enacted the Banking Act of 1933, known as the Glass-Steagall Act (Glass-Steagall), to prohibit commercial banks from offering investment banking and insurance services, including title insurance.

Starting in the 1980's, through a series of deregulatory decisions by the Board of Governors of the Federal Reserve System (the Fed), the Office of the Comptroller of Currency (OCC) and the Federal courts, commercial banks were increasingly engaging in what were considered risky financial activities that were previously restricted under Glass-Steagall.

In 1999, Congress enacted the GLB which repealed Sections 20 and 32 of Glass-Steagall, the required separation between commercial and investment banking. The GLB allowed for complex cross-subsidies and interconnections and affiliations between commercial and investment banks.

Subsequent investigations and government reports on the period between passage of GLB and the recent Great Recession of 2008 disclosed that regulation and supervision of traditional banking had been significantly weakened to permit risky speculation by banks and that deregulation made the financial system vulnerable to the financial crisis and exacerbated its effects.

A Senate Permanent Subcommittee on Investigations of the financial industry concluded that repeal of Glass-Steagall made it more difficult for regulators to distinguish between activities intended to benefit consumers versus the financial institution itself and contributed to the multiple and significant conflicts of interest that arose between banks and their customers.

In the notorious instance of AIG, then the world's largest insurer of credit-default swaps (insurance offerings to safety-net the risky Wall Street speculation that helped fuel the Great Recession of 2008), the failure to prohibit banks from engaging in the business of insurance allowed investment banks such as Goldman Sachs to utilize their conflicted positions to leverage insurance out of failed investments – all of which were later subsidized by American taxpayers.

Where Does Title Insurance Come In?

When Glass-Steagall was repealed in 1999 with the passage of GLB, the title insurance industry was directly impacted. The GLB has several provisions dealing directly with the business of title insurance. As a general rule, the GLB prohibited national banks from underwriting or selling title insurance. There are several exceptions to this rule:

1. A national bank may sell insurance in a state if the banks chartered in that state are authorized to sell such insurance.
2. Any national bank engaged in title insurance underwriting or sales may conform to do so if it was actively and lawfully conducting such activities prior to the date of enactment (1999) of the Act.
3. A subsidiary of a national bank may sell title insurance.

In addition, state anti-affiliation laws were preempted by GLB meaning that federal law preempted any state law on the subject. The GLB provides that a state may not prevent a bank from affiliating with an insurance agency, broker or underwriter. Because GLB exceptions tend to “grandfather” or permit a bank through state insurance laws to act as a title insurance producer, any effective repeal of that provision, from the perspective of interested independent land title agents, must prohibit a subsidiary, not just an affiliate, of a bank from selling title insurance, as well.

H.R. 3711 and S. 1282 Would Likely Prohibit Banks from Selling Title Insurance.

Under the proposed legislation, both H.R. 3711 and S. 1282 prohibit banks from being an “affiliate” of any insurance company. An “affiliate” is defined under the Bank Holding Company Act Section 2(k) as “any company that controls, is controlled by, or is under common control with another company.”

While it appears that the proposed legislation does not also prohibit banks from creating “subsidiaries” who may then, under GLB, act as a subsidiary of a bank and sell title insurance, the proposed legislation strikes Section 4 of the Bank Holding Company Act, subsection (k) which allowed banks to engage in activities that are financial in nature, whether by the bank

holding company or its subsidiaries. Included in the list of activities that are prohibited include insurance and specifically indemnifying risk, such as title insurance.

Therefore, it appears that the proposed legislation will address one of the great new problems of the modern era of title insurance – the title insurance market infiltration posed by lenders. The proposed bills would prohibit banks from creating their own insurance entities, including title insurance.

Why Should Independent Title Insurance Agents Support Glass-Steagall Legislation?

The common argument against Glass-Steagall legislation is that banks need to have the flexibility to create working capital because markets free of burdensome regulation assist the broader economy. In other words, when banks create securitized mortgage investments and sell them ten thousand times over, to investors all over the world, it makes American mortgage investments more attractive and helps drive lower interest rates, etc.

As long as the banks' investment is truly at risk, such a model is workable. No bank President is going to risk their livelihood or their company's future if they have risk in the investment. However, when banks can offload their risky investment on someone else without penalty or even insure against the failure of that investment through a commonly-held insurance entity, it forces the government to make the tough choice of deciding, in the event of market failure, whether to let the investor bank go south (as in the case of Lehman Brothers in 2008) with taxpayer consequences or to force the government to step in to try to prop up an industry that is tied to the broader economy (as in the case of the auto manufacturer bailout). Either way is not good for our economy.

Thinking more local, it is clear that Glass-Steagall legislation would be good for independent land title agents who regularly compete against national banks and state chartered regional banks for settlement customers.

Lenders use their position in the real estate transaction to steer their mortgage consumers to title agents affiliated with the lender or, in some cases, actually owned by the lender. These efforts help to restrict consumer choice and eliminate downward pricing pressures that would help keep title insurance costs lower for consumers. Glass-Steagall legislation would end this practice. Combined with tougher and more robust RESPA enforcement, Glass-Steagall legislation would help to enhance consumer options at the closing table and create incentives for title agencies to compete on price and service. While such a bill would have obvious advantages for independent land title agents, it would also benefit American real estate consumers who desire choice, non-conflicted fiduciaries and the best service possible.

Independent land title agents welcome the opportunity to have access to mortgage consumers who might benefit from lower costs, better service and unconflicted representation.

About NAILTA:

The National Association of Independent Land Title Agents (NAILTA) is a non-profit trade association that represents the interests of independent title insurance agents and independent real estate settlement professionals from across the United States. It was created by independent real estate settlement professionals to further the agenda of small business owners from within the title insurance, abstracting, surveying, and real estate community who lack representation at local, state and national levels.

To contact NAILTA, please visit our website at www.nailta.org.