The biggest obstacle to success with this project is the consumers' reliance upon Realtor advice in shopping and comparing title insurance firms and products. Most of that “advice” is in the form of predatory fiduciary steering into affiliated business arrangements or firms for which the Realtors have Marketing Service Agreements. The first thing that needs to be “disclosed” to consumers is a warning to not trust self-serving advice. If the advice of their agent involves a recommendation that favors the referrers or their firm, then the consumer should be warned that their agent may be engaged in illegal conduct. This is not an exaggeration.

In almost every state, real estate licensees (and many mortgage loan officers) are statutory fiduciaries and are likely violating state law by engaging in self-dealing. When it comes to advising consumers on title firms, state licensing law completely trumps RESPA* and provides immense more consumer protections to consumers than most Realtors or consumers understand. Members of the NAIC have a huge untapped resource for enforcement actions in this area. If you really want to prepare consumers to make informed decisions on title insurance, then you must first warn them about these relationships, explain how steering is likely illegal in their state, how to report those situations and how to ask their Realtor or loan officer to engage in due diligence that does not involve self-dealing.

Consider the RESPA and state fiduciary law differences in disclosure requirements necessary to make self-dealing legal. For non-fiduciaries (builders), they only need to comply with RESPA AfBA disclosure laws which are minimal. For licensees in those states where licensees are fiduciaries (every state except Florida?), state law requires fiduciaries to avoid conflicts of interests, prohibits self-dealing and allows exceptions in some extreme situations. In order to make self-dealing legal a fiduciary must disclose all the known and unknown material ramifications to the consumer and make a full accounting of profits the fiduciary (the broker and the agent) are receiving. Another unobtainable requirement is to obtain the informed consent of their client. The burden of proof is typically on the fiduciary to prove that they obtained the informed consent of their client before proceeding. A mere written and signed disclosure does not suffice. The vast amount of consumer protection law in this area needs to be recognized by this group. To ignore without investigating is irresponsible and why we have chosen to object to this project.

If all the conflicts of interest were properly disclosed to a consumer, they would rarely select the affiliated title firm. Today, most consumers are steered into affiliated firms. We are currently helping a consumer whose broker-owned title firm after the closing altered a seller financing document that rendered the title unmarketable. The broker had a close relationship with the seller and the seller wanted to limit the assignability of the property. However, the broker missed putting this in the purchase agreement and it wasn’t in the closing documents the buyer signed. The buyer didn’t find out until they went to sell the property. This was done by one of the largest title firms in the area. Affiliations are really relationships that give the referrer unreasonable control over the transaction. The disclosures necessary to render these legal for fiduciaries are almost impossible making them illegal in most circumstances. Your document needs to help rectify this problem by properly arming consumers with the tools necessary to question the actions of their licensed fiduciary.

And please don’t forget about state licensing law (pretty sure every state) in regards to the unauthorized solicitation of insurance. When Realtors, loan officers and builders engage in steering to title insuring AfBA’s, most are engaged in the illegal activity of solicitation of title insurance without a license.

*RESPA – 12 U.S. Code § 2616 states: “The Bureau may not determine that any State law is inconsistent with any provision of this chapter if the Bureau determines that such law gives greater protection to the consumer.”

Doug Miller