



UNITED STATES OF AMERICA



FEDERAL TRADE COMMISSION  
Washington, DC 20580

DEPARTMENT OF JUSTICE  
Washington, DC 20530

April 15, 2008

By email and first class mail  
The Honorable Daniel E. Shearouse  
Clerk of Court  
Supreme Court of South Carolina  
P.O. Box 11330  
Columbia, SC 29211

Re: Proposed Guidelines for Residential and Commercial Real Estate Closings

Dear Mr. Shearouse:

The Federal Trade Commission (FTC) and the Department of Justice are pleased to respond to the South Carolina Supreme Court's request for comments on the Proposed Guidelines for Residential and Commercial Real Estate Closings that delineate the scope of the practice of law as it relates to the transfer of real property.<sup>1</sup> This Court has observed that defining what constitutes the practice of law should be guided by consumers' interests.<sup>2</sup> The Justice Department and the FTC agree: we believe that consumers receive the greatest benefit when non-attorneys compete with attorneys except in circumstances where specialized legal knowledge and training has been demonstrated to be necessary to protect the interests of

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<sup>1</sup> The notice and proposed guidelines are available at <http://www.sccourts.org/whatsnew/displayWhatsNew.cfm?indexId=436>. The proposed guidelines delineate seven tasks related to residential and commercial real estate transactions that must be performed by an attorney licensed to practice in South Carolina, including performing all title work, preparing deeds, overseeing the drafting of documents pertinent to the loan closing, supervising the closing, and disbursing all funds related to the transaction. In the case of a home equity line of credit, the proposed guidelines still would require consumers to hire an attorney to perform title work and to prepare deeds. The guidelines appear to reiterate the current state of South Carolina law in this area. See, e.g., *Doe v. McMaster*, 355 S.C. 306 (2003); *State v. Buyers Service Company, Inc.*, 292 S.C. 426 (1987).

<sup>2</sup> See *Doe*, 355 S.C. at 311 n.3 (2003) ("this Court grounds its unauthorized practice rules in the State's ability to protect consumers in the state and not as a method to enhance the business opportunities of lawyers").

consumers.<sup>3</sup> As this Court grapples with the important issue of what should constitute the practice of law in the context of commercial and residential real estate transactions, we respectfully suggest that it may wish to take note of the benefits consumers in other states have received from competition and consider relaxing current restraints on competition between attorneys and non-attorneys in this area, which likely will benefit South Carolina consumers.<sup>4</sup>

A small minority of states (including South Carolina) restrict non-attorneys from providing services related to real estate transactions, such as title searching, title abstracting, title opinions, preparing deeds and mortgages, supervising closings, and disbursing funds.<sup>5</sup> The

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<sup>3</sup> Accordingly, through advocacy letters and *amicus curiae* briefs, the Justice Department and the FTC have urged several state supreme courts and legislatures, the American Bar Association, and many state bar associations to reject or narrow undue restrictions on competition between attorneys and non-attorneys. See letter from the Department of Justice and FTC to the Hawaii Supreme Court (January 25, 2008) available at <http://www.ftc.gov/os/2008/01/V080004letter.pdf>; two letters from the Justice Department and the FTC to the Committee on the Judiciary of the New York State Assembly (June 21, 2006 and April 27, 2007) available at <http://www.ftc.gov/os/2006/06/V060016 NYUplFinal.pdf> and <http://www.ftc.gov/be/V070004.pdf>; letter from the Justice Department and the FTC to Executive Director of the Kansas Bar Ass'n (Feb. 4, 2005) available at <http://www.ftc.gov/be/v050002.pdf>; letter from the Justice Department and the FTC to Task Force to Define the Practice of Law in Massachusetts, Massachusetts Bar Ass'n (Dec. 16, 2004) available at <http://www.ftc.gov/os/2004/12/041216massuplltr.pdf>; letter from the Justice Department and the FTC to Unauthorized Practice of Law Committee, Indiana State Bar Ass'n (Oct. 1, 2003) available at <http://www.ftc.gov/os/2003/10/uplindiana.htm>; letter from the Justice Department and the FTC to Standing Committee on the Unlicensed Practice of Law, State Bar of Georgia (Mar. 20, 2003) available at <http://www.ftc.gov/be/v030007.htm>; letter from the Justice Department to Speaker of the Rhode Island House of Representatives (Mar. 28, 2003) available at <http://www.ftc.gov/be/v020013.htm>; letter from the Justice Department and the FTC to Task Force on the Model Definition of the Practice of Law, American Bar Ass'n (Dec. 20, 2002) available at <http://www.ftc.gov/opa/2002/12/lettertoaba.htm>; letter from the Justice Department and the FTC to Speaker of the Rhode Island House of Representatives, *et al.* (Mar. 29, 2002) available at <http://www.ftc.gov/be/v020013.pdf>; letter from the Justice Department and the FTC to President of the North Carolina State Bar (July 11, 2002) available at <http://www.ftc.gov/os/2002/07/non-attorneyinvolvement.pdf>; letter from the Justice Department and the FTC to Ethics Committee of the North Carolina State Bar (Dec. 14, 2001) available at <http://www.ftc.gov/be/V020006.htm>; letters from the Justice Department to Board of Governors of the Kentucky Bar Ass'n (June 10, 1999 and Sept. 10, 1997); letter from the Justice Department and the FTC to Supreme Court of Virginia (Jan. 3, 1997); letter from the Justice Department and the FTC to Virginia State Bar (Sept. 20, 1996). Brief *Amicus Curiae* of the United States of America and the FTC in *Lorrie McMahon v. Advanced Title Servs. Co. of W. Va.*, No. 31706 (May 25, 2004) available at <http://www.usdoj.gov/atr/cases/f203700/203790.htm>; Brief *Amicus Curiae* of the United States of America and the FTC in On Review of ULP Advisory Opinion 2003-2 (July 28, 2003) available at <http://www.usdoj.gov/atr/cases/f201100/201197.htm>; Brief *Amicus Curiae* of the United States of America in Support of Movants Kentucky Land Title Ass'n *et al.* in *Ky. Land Title Ass'n v. Ky. Bar Ass'n*, No. 2000-SC-000207-KB (Feb. 29, 2000) available at <http://www.usdoj.gov/atr/cases/f4400/4491.htm>.

<sup>4</sup> We understand that relaxing restrictions on non-lawyers relative to those set forth in the proposed Guidelines also may require changes in the law as articulated in South Carolina judicial decisions.

<sup>5</sup> In a majority of states, non-lawyers compete with lawyers to provide services related to the real estate transaction, including preparation and execution of a deed, title searching and issuing title reports, the answering of non-legal questions during the closing process, witnessing the signatures at closing, and the disbursement of funds. See, e.g., Joyce Palomar, *The War Between Attorneys & Lay Conveyancers – Empirical Evidence Says “Cease*

available empirical evidence shows that consumers in these states pay higher prices to settle their real estate transactions than do consumers in states that allow non-attorney competition.<sup>6</sup> At the same time, because there is no evidence that non-attorneys provide lower quality services related to real estate transactions than do attorneys, such restrictions on competition do not appear to provide consumers with any countervailing benefits.

Concern for the Public Interest Should Guide the Imposition of  
Restrictions on Competition between Attorneys and Non-Attorneys

This Court has observed that it is guided by consumers' interests when delineating those tasks that require an attorney from those that a non-attorney can perform.<sup>7</sup> The Justice Department and the FTC recognize that there are some services requiring the specialized knowledge and skill of a person trained in the law that should be provided only by attorneys. For example, only an individual with legal knowledge and requisite understanding of law and litigation procedures should represent clients in open court in matters involving their legal rights. Such a limitation protects consumers as well as the court and provides for an efficient process without significant risk to consumers.

Like all consumers, however, consumers of professional services benefit from competition,<sup>8</sup> and if competition to provide such services is restrained, consumers may be forced to pay higher prices or accept lower quality services. Allowing non-attorneys to compete in the provision of certain types of services permits consumers to select from a broader range of options, considering for themselves such factors as cost, convenience, and their confidence in the competence and quality of the services provided. As the United States Supreme Court stated:

The assumption that competition is the best method of allocating resources in a free market recognizes that *all elements of a bargain - quality, service, safety, and*

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*Fire!*," 31 CONN. L. REV. 423, 487-88 (1999) (noting that there are more states in which non-attorneys perform the majority of real estate transactions than in which attorneys perform them); Michael Braunstein, *Structural Change & Inter-Professional Competitive Advantage: An Example Drawn from Residential Real Estate Conveyancing*, 62 MO. L. REV. 241, 264-65 (1997) (reporting that in only eight states is it customary for an attorney to be involved in settlement).

<sup>6</sup> See notes 12-15, *infra*, and accompanying text.

<sup>7</sup> See *Doe*, 355 S.C. at 311 n.3 (2003).

<sup>8</sup> See, e.g., *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 689 (1978); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975); see also *United States v. Am. Bar Ass'n*, 934 F. Supp. 435 (D.D.C. 1996), *modified*, 135 F. Supp. 2d 28 (D.D.C. 2001).

*durability* - and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.<sup>9</sup>

In general, sound competition policy calls for competition to be restricted only when necessary to protect the public from significant harm, and for the restriction to be narrowly drawn to minimize its anticompetitive impact.<sup>10</sup> In some instances, although competence is required to provide the services in question, a license to practice law may not equate to such competence, nor may legal training be necessary skillfully to perform the services. The inquiry into the public interest involves not only an assessment of the harm that consumers may suffer from allowing non-attorneys to perform certain tasks, but also consideration of the benefits that accrue to consumers when attorneys and non-attorneys compete to provide services that need not be reserved exclusively for attorneys.<sup>11</sup>

#### Consumers Required to Hire Lawyers to Settle Real Estate Transactions Pay Higher Prices Than Consumers Who are Permitted to Hire Non-Attorneys

Evidence suggests that preventing non-attorneys from competing with attorneys to provide services like title abstracting, drafting deeds, supervising closings, and disbursing funds likely causes consumers to pay higher prices to close their real estate transactions than they otherwise would. First, those examining the issue have found that non-attorneys charge less than attorneys to provide these services. For example, a survey conducted in Virginia found that consumers paid on average almost \$200 less when a non-attorney settled their real estate transaction compared to fees charged by an attorney.<sup>12</sup> In addition to charging lower prices, some lay service providers compete with attorneys on the basis of timeliness and convenience.<sup>13</sup>

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<sup>9</sup> *Prof'l Eng'rs*, 435 U.S. at 695 (emphasis added); accord, *FTC v Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 423 (1990).

<sup>10</sup> *Cf. FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 459 (1986) ("Absent some countervailing procompetitive virtue," an impediment to "the ordinary give and take of the market place . . . cannot be sustained under the Rule of Reason.") (internal quotations and citations omitted).

<sup>11</sup> *See Prof'l Eng'rs*, 435 U.S. at 689; *Goldfarb*, 421 U.S. at 787. *See also In re Opinion No. 26 of the Comm. on Unauthorized Practice of Law*, 654 A.2d 1344, 1345-46 (N.J. 1995) (lawyer/non-lawyer competition benefits the public interest).

<sup>12</sup> MEDIA GENERAL, *RESIDENTIAL REAL ESTATE CLOSING COST SURVEY*, 5 (Sept. 1996).

<sup>13</sup> *See Perkins v. CTX Mortgage Co.*, 969 P.2d 93, 100 (Wash. 1999) ("permitting mortgage lenders to prepare loan documents in the way the CTX does relieves borrowers of the cost and inconvenience of having attorneys prepare their loan documents"); *State Bar v. Guardian Abstract & Title Co.*, 575 P.2d 943, 949 (N.M. 1978) ("The uncontroverted evidence was that using lawyers for this simple operation considerably slowed the loan closings and cost the persons involved a great deal more money.").

Second, even those consumers who prefer to employ attorneys to handle their real estate transaction likely pay higher prices in the absence of competition from non-attorney providers. The availability of alternative, lower-cost lay service providers typically constrains the fees that attorneys can charge to settle real estate transactions. Indeed, when it examined this issue, the Kentucky Supreme Court found “before title companies emerged on the scene, [the Kentucky Bar Association’s] members’ rates for such services were significantly higher – in some areas as much as 1% of the loan amount plus additional fees.”<sup>14</sup> The court in *Countrywide* also noted that “the presence of title companies encourages attorneys to work more cost-effectively.”<sup>15</sup>

### There Is No Indication that the Existing Restrictions Are Necessary to Prevent Consumer Harm

Restrictions on competition generally are considered harmful to consumers. Accordingly, such restrictions are justified only by a showing that they are necessary to prevent significant countervailing consumer harm and are narrowly drawn to minimize their anticompetitive impact.<sup>16</sup> Without a showing that allowing non-attorneys to perform certain tasks related to the real estate transaction has a negative impact on consumers, the current restraints on competition likely harm consumers by raising prices and eliminating their ability to choose among competing providers, without providing any countervailing benefits.

The trend in states that have opened real estate settlement services to non-attorney competition has been to achieve consumer benefits without an increase in consumer injury attributable or unique to non-attorney services. As the Restatement (Third) of Law Governing Lawyers has explained:

Several jurisdictions recognize that many such [law-related] services can be provided by nonlawyers without significant risk of incompetent service, that actual experience in several states with extensive nonlawyer provision of traditional legal services indicates no significant risk of harm to consumers of such services, that persons in need of legal services may be significantly aided in obtaining assistance at a much lower price than would be entailed by

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<sup>14</sup> *Countrywide Home Loans, Inc. v. Ky. Bar Ass’n*, 113 S.W.3d 105, 120 (Ky. 2003). See also, *In re Opinion No. 26 of the Comm. on Unauthorized Practice of Law*, 654 A.2d at 1349 (evidence gathered in that proceeding indicated that buyers and sellers in areas of New Jersey where lay-assisted closings were prevalent paid on average \$350 and \$450 less for closings, respectively, than did buyers and sellers in parts of the state where lay-assisted closings were not prevalent).

<sup>15</sup> *Countrywide Home Loans*, 113 S.W.3d at 120.

<sup>16</sup> *Ind. Fed’n of Dentists*, 476 U.S. at 459.

segregating out a portion of a transaction to be handled by a lawyer for a fee, and that many persons can ill afford, and most persons are at least inconvenienced by, the typically higher cost of lawyer services. In addition, traditional common-law and statutory consumer-protection measures offer significant protection to consumers of such nonlawyer services.<sup>17</sup>

In addition, an empirical study compared five states where lay providers examined title evidence, drafted instruments, and facilitated the closing of real estate transactions with five states that prohibited lay provision of these settlement services. The author found “[t]he only clear conclusion” to be “that the evidence does not substantiate the claim that the public bears a sufficient risk from lay provision of real estate settlement services to warrant blanket prohibition of those services under the auspices of preventing the unauthorized practice of law.”<sup>18</sup> Perhaps most significantly, a 1999 survey found that in most states complaints about the unauthorized practice of law did not come from consumers, the potential victims of such conduct, but from attorneys, who did not allege any claims of specific injury.<sup>19</sup>

#### Other Jurisdictions Have Fostered Competition While Protecting Consumers Through Less Restrictive Alternatives

To the extent other states have been concerned about reducing the risk of harm to consumers of real estate settlement services, some have chosen alternatives that better preserve competition. For example, the New Jersey Supreme Court has required written notice to consumers of the risks involved in proceeding with a real estate transaction without an attorney,<sup>20</sup> which permits consumers to make an informed choice about whether to use lay closing services. Another example is Virginia’s Consumer Real Estate Settlement Protection Act (CRESPA),<sup>21</sup> which allows licensed attorneys, title insurance companies, title insurance agents, or any licensed financial institution to provide settlement services. Also, CRESPA defines “settlement services” to include title searches; all aspects of arranging for title insurance; receiving and issuing receipts of money; ordering loan checks, payoffs, surveys, and inspections; preparing settlement statements; determining that all closing documents conform to the parties’

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<sup>17</sup> RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 4 cmt. c (2000).

<sup>18</sup> Palomar, *supra* n. 5 at 520.

<sup>19</sup> Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369, 407-08 (2004).

<sup>20</sup> *In re Op. No. 26*, 654 A.2d. at 1363.

<sup>21</sup> *See* VA. CODE § 6.1-2.21(A).

contract requirements; and making all logistical arrangements for closings.<sup>22</sup> CRESPA requires anyone (including lawyers) providing settlement services to be registered with the state.<sup>23</sup> By adopting an expansive definition of settlement services and allowing more people to provide such services, and by requiring that settlement agents register with the state and be insured, CRESPA preserves competition while also providing safeguards for consumers. Though more regulatory than the New Jersey approach, the Virginia approach is clearly a more competitive approach than an outright ban on non-attorney closings.

### Conclusion

The assistance of an attorney during a real estate-related transaction may be desirable, and consumers may decide to retain an attorney in certain situations. Nonetheless, the choice of hiring an attorney or a non-attorney settlement service provider should rest with the consumer, particularly when there is no evidence that consumers are harmed by using non-attorneys to provide certain types of real estate settlement services. We therefore encourage this Court to delineate the scope of the practice of law in a way that fosters competition in service areas for which the knowledge and skill of a lawyer is not required while protecting consumers of real estate settlement services.

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<sup>22</sup> *Id.* See also “Unauthorized Practice of Law (UPL) Guidelines for Real Estate Settlement Agents,” Virginia State Bar, § III, available at <http://www.vsb.org/crespa/13guidelines.html>.

<sup>23</sup> CRESPA also requires that settlement agents obtain insurance with minimum coverage limits of \$250,000, have employee fidelity bonds in the amount of \$100,000, and maintain a surety bond not less than \$100,000. Virginia does not require attorneys to have malpractice insurance but requires an insurance disclosure. Va. Code § 6.1-2.21(D).

Sincerely yours,

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By direction of the  
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