UNITED STATES OF AMERICA

FEDERAL TRADE COMMISSION
Washington, DC 20580

DEPARTMENT OF JUSTICE
Washington, DC 20530

March 29, 2002

The Honorable John B. Harwood
Speaker of the House of Representatives
Speaker's Office
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Dear Speaker and Members of the House of Representatives:

We understand that the Rhode Island House of Representatives is considering legislation

[1] In addition, the Justice Department has challenged attempts by county bar associations to adopt restraints similar to the proposed legislation. For example, the Justice Department sued and obtained a judgment against one bar association that had restrained title insurance companies from competing in the business of certifying title. The bar association had adopted a resolution requiring lawyers' examinations of title abstracts and had induced banks and others to require the lawyers' examinations of their real estate transactions. *United States v. Allen County Indiana Bar Association*, Civ. No. F-79-0042 (N.D. Ind. 1980). Likewise, the Justice Department obtained a court order prohibiting another county bar association from restricting the trust and estate services that corporate fiduciaries could provide in competition with attorneys. *United States v. New York County Lawyers' Association*, No. 80 Civ. 6129 (S.D.N.Y. 1981).

[2] *See, e.g., Federal Trade Commission v. Superior Court Trial Lawyers Association*

H. 7462 would apply to both residential and commercial closings. The bill would apply to initial purchases, refinancings, second mortgages, and closed-end home equity loans (in which a borrower receives a loan secured by the real estate, with a fixed repayment schedule). The bill would require buyers and borrowers to hire attorneys throughout the closing process. Buyers and borrowers refinancing existing mortgages would have to hire lawyers to represent them in "examining" title and removing exceptions to title, supervising the disbursement of funds, and responding to questions and ramifications of the transaction. Currently, lawyers and non-lawyers compete to provide these services. Moreover, almost all Rhode Island title searches are presently performed by independent third-parties who are not lawyers. If the bill's provision governing "examining" title means that lawyers must conduct title searches, the result would be a complete change in Rhode Island practice. If the bill refers instead to reviewing the results of the title search, this function also is currently performed both by skilled non-lawyers and attorneys. Furthermore, non-lawyers currently clear exceptions to title when doing so does not involve the

Island has recognized. *See Unauthorized Practice of Law Committee v. State of Rhode Island*, 543 A.2d 662, 665-66 (R.I. 1988).

Indeed, when the Supreme Court of New Jersey rejected an Unauthorized Practice of Law ("UPL") opinion similar to the legislation at issue here, it wrote:

> The question of what constitutes the unauthorized practice of law involves more than an academic analysis of the function of lawyers, more than a determination of what they are uniquely qualified to do. It also involves a determination of whether nonlawyers should be allowed, in the public interest, to engage in activities that may constitute the practice of law.
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> We determine the ultimate touchstone -- the public interest -- through the balancing of the factors involved in the case, namely, the risks and benefits to the public of allowing or disallowing such activities.

In re Opinion No. 26 of the Committee on the Unauthorized Practice of Law, 654 A.2d 1344, 1345-46 (N.J. 1995).

In considering how best to protect the public interest, it is worth noting that the antitrust laws and competition policy generally consider sweeping restrictions on competition harmful to consumers and justified only by a showing that the restriction is needed to prevent significant consumer injury. Our analysis supports the conclusion that the public interest would not be harmed, and indeed would be significantly served, by continuing to allow competition from lay services in Rhode Island.

The Proposed Legislation Would Likely Hurt the Public
by Raising Prices and Eliminating Service Competition

Free and unfettered competition is at the heart of the American economy. The United States Supreme Court has observed, "ultimately, competition will produce not only lower prices but also better goods and services. 'The heart of our national economic policy long has been faith in the value of competition.'" *National Society of Professional Engineers v. United States*, 435 U.S. 679, 695 (1978) (citing *Standard Oil Co1 c107.2mndard Oilto alln will pTD /F4 d6713 Tc 0713 Tc5ing*

[5] For example, the DOJ and FTC have analyzed the impact of competition from non-lawyer closing services in New Jersey, Virginia, and North Carolina. *See* Letter from Charles A. James and Timothy J. Muris to the Ethics Committee of the North Carolina Bar Re North Carolina State Bar Opinions Restricting Involvement of Non-Attorneys in Real Estate Closings and Refinancing Transactions (Dec. 14, 2001) <http://www.ftc.gov/be/V020006.htm>; Letter from Joel I. Klein and William J. Baer to the Supreme Court of Virginia Re Proposed UPL Opinion #183 (Jan. 3, 1997) <http://www.ftc.gov/be/v960015a.htm>.

conduct their entire loan application and approval process via the Internet, simultaneously reducing costs and increasing customer convenience. The convenience offered by Internet-based mortgage lenders may be especially important to some Rhode Island consumers. The bill could diminish these options.

Fourth, if by requiring lawyers to "examine titles," the bill applies to title searches, it means that consumers and businesses would have to pay attorneys to perform this time-intensive search currently conducted by third-party lay services.

The use of lay closers has reduced costs to consumers in other states. In 1995, after a 16-day evidentiary hearing conducted by a special master, the New Jersey Supreme Court rejected an opinion eliminating lay closings. The Court found that real estate closing fees were much lower in southern New Jersey, where lay closings were commonplace, than in the northern part of the State, where lawyers conducted almost all closings. This was true even for consumers who chose attorney closings. South Jersey buyers represented by counsel throughout the entire transaction, including closing, paid $650 on average, while sellers paid $350. North Jersey buyers represented by counsel paid an average of $1,000 and sellers paid an average of $750. *See In re Opinion No. 26*, 654 A.2d at 1348-49.[7]

The experience in Virginia was similar. Lay closing services have operated in Virginia since 1981, when the State rejected an Opinion declaring lay closings to be the unauthorized practice of law. A 1996 Media General study found that lay closings in Virginia were substantially less expensive than attorney closings.

Virginia Closing Costs			
	Median	Average	Average Including Title Examination
Attorneys	$350	$366	$451
Lay Services	$200	$208	$272

Media General, *Residential Real Estate Closing Cost Survey*, September 1996 at 5. In 1997, Virginia passed a law upholding the right of consumers to continue using lay closing services. *Va. Code Ann.* §§ 6.1-2.19 - 6.1-2.29 (Michie 1997). (At the time, the state Supreme Court had been considering an Opinion declaring real estate closings to be the practice of law. *See Proposed Virginia UPL Opinion No. 183*.)

[7] In South Jersey, about 40% of buyers and 35% of sellers were represented by counsel at closing. In North Jersey, 95.5% of buyers and 86% of sellers were represented by counsel.

Rhode Island's experience is likely to be similar. One industry source estimated that costs could increase by at least $200-500 if buyers are required to hire their own attorneys, in addition to paying for the lender's closing lawyer. Currently, if buyers choose to hire their own title lawyers, they pay an additional $200-500.

Furthermore, the bill is likely to hurt consumers by denying them the right to choose a lay

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

National Society of Professional Engineers, 435 U.S. at 695 (emphasis added); *accord*, *Superior Court Trial Lawyers Association*, 493 U.S. at 423. Allowing non-lawyers to compete permits Rhode Island consumers to consider all relevant factors in selecting a provider of closing services, such as cost, convenience, and the degree of assurance that the necessary documents and commitments are sufficient. In general, the antitrust laws and competition policy require that a sweeping private restriction on competition be justified by a valid need for the restriction and require that the restriction be narrowly drawn to minimize its anticompetitive impact. These requirements protect the public interest in competition. *See generally F.T.C. v. Indiana Federation of Dentists*, 476 U.S. 447, 459 (1986).

There does not seem to have been any showing of need for extensive prohibitions of lay closing service competition. At a minimum, the House should not adopt H. 7462 unless it sees strong factual evidence demonstrating that Rhode Islanders are actually hurt by the availability of closing services performed by anyone other than an employee of a corporation owned entirely by Rhode Island lawyers, a domestically chartered title company, or a title insurance company, and finds that this is not outweighed by the harm to consumers of foreclosing competition.

The Justice Department and the Federal Trade Commission have spoken with several participants in the Rhode Island real estate industry, including lawyers. None has cited any instances of actual consumer injury in Rhode Island from non-lawyer closings. In fact, it appears that at least one attorney has absconded with real estate transaction proceeds. *See Four Lawyers Disciplined in Separate Cases*, PROVIDENCE JOURNAL, June 4, 1996 at B08 (attorney Philip Champagne embezzled $50,000 from proceeds of real estate transaction). A showing of harm is particularly important where, as here, the proposed restraint prevents consumers from using an entire class of providers. Without a showing of actual harm, restraining competition in a way that is likely to hurt Rhode Islanders by raising prices and eliminating consumers' ability to choose among competing providers is unwarranted.

Proponents of the bill have not demonstrated that skilled non-lawyers cannot perform the functions of examining titles and removing exceptions, supervising the disbursement of funds, and responding to non-legal questions and explaining the non-legal ramifications of a real estate transaction. Non-lawyers currently do almost all of the title searches in Rhode Island. Non-lawyers do work to remove title exceptions; they call lenders for discharges on previous mortgages, for example, and review the results of those calls to determine whether to remove an exception. Indeed, the process of removing exceptions is often easier in refinancings and closed-end home equity loans and yet legal representation of the borrower would also be required for them. Likewise, non-lawyers currently answer non-legal questions from buyers and borrowers. For example, if a consumer asks what a foreclosure is, a non-lawyer can answer that question.

Similarly, non-lawyers supervise the disbursement of funds, with no harm to consumers.[8] According to witnesses, closing is largely an administrative task that may be performed by non-lawyers.

Indeed, the proposed legislation appears to recognize that it is not necessary for a lawyer to perform the closing functions. The bill would continue to allow closings by lenders of their home equity lines of credit, and closings by "domestically chartered title insurance companies," and by any corporation "lawfully engaged in the insuring of titles to real property." Consumers and businesses who close using these entities would not have to hire lawyers to perform these functions. Non-lawyers could examine their title and remove exceptions, supervise fund disbursement, and answer their questions and explain the transaction's ramifications. (Of course, as in all situations, these non-lawyers could not provide legal advice.)

Moreover, a substantial number of closings involve home equity loans or the refinancing of existing loans.[9] Because a related transaction has already gone through the closing process once, property law questions (e.g., relating to clear title) are less likely to arise, and legal advice on these matters is less likely to be needed.

The assistance of a licensed lawyer at closing may be desirable, and consumers may decide they need a lawyer in certain situations. A consumer might choose to hire an attorney to answer legal questions, perform title work, provide advice, negotiate disputes, or offer various protections. Consumers who hire attorneys may in fact get better service and representation at the closing than those who do not. But, as the New Jersey Supreme Court has concluded, this is no sound reason to eliminate lay closing services as an alternative. *In re Opinion No. 26*, 654 A.2d at 1360. Rather, the choice of hiring a lawyer or a non-lawyer should rest with the consumer. *Id*.

Less Restrictive Measures May Protect Consumers

Rhode Islanders will likely face substantially higher closing costs if competition from non-lawyers is forbidden by the bill. These costs should not be imposed without a convincing showing not only that lay closings have injured consumers, but also that less drastic measures Rhode Island consumecanmay by Protormed ic measures

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[8] The bill requires counsel to represent the buyer in supervising the disbursement of funds. The disbursement of funds is done by the lender and its representative. It is not clear what function the buyer's lawyer would have with regard to this task.

[9] The bill excepts home equity lines of credit but not closed-end home equity loans.

[10] The Virginia approach carries some additional risk of consumer harm, since licensing regulation itself can be used to thwart competition. *See*

> it might appear that the local purpose, rather than being legitimate, is, in substantial part, to benefit the local bar. This appearance can be rebutted only by showing a legitimate purpose that could not be served as well by non-discriminatory means.

807 F.2d at 290. The court concluded that no such showing had been made. We would urge the House of Representatives to consider whether the proposed legislation could similarly burden interstate commerce in violation of the U.S. Constitution.

Conclusion

By imposing extensive prohibitions on lay closings, H. 7462 will reduce competition and will likely raise closing costs for Rhode Island consumers by requiring them to hire lawyers in circumstances where they may not be necessary.

Other states' experience suggests that the bill will likely cause consumers to pay significantly more for real estate closings. For example, in Virginia, median lay closing costs were $150 less. In parts of New Jersey where lay closings are prevalent, buyers represented by counsel paid $350 less, on average, and sellers paid $400 less. Even consumers who chose attorney closings paid less as a result of the competition attorneys face from non-lawyer closings. Currently, Rhode Island consumers pay $200-500 more if they choose to hire their own title lawyers; the bill would likely raise costs by that amount or more for consumers who would otherwise choose not to hire a lawyer. In addition, the bill could curtail competition from out-of-state and Internet-based lenders, potentially increasing costs and reducing the convenience of the loan application and approval process. There has been no showing of harm to consumers from lay closings that would be substantial enough to justify these reductions in competition. Rather, the bill could harm Rhode Island consumers substantially. We respectfully recommend that the House of Representatives reject the bill.

The Justice Department and the Federal Trade Commission appreciate this opportunity to present our views and would be pleased to address any questions or comments regarding competition policies.

Sincerely yours,

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By Order of the
Federal Trade Commission,

Timothy J. Muris
Chairman

Ted Cruz, Director
Office of Policy Planning