[1] 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).

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[3] 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 Supt

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.[6] 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.[7] 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,[8] 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*

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).

[6] *See* notes 12-15, *infra*, and accompanying text.

[7] *See Doe*, 355 S.C. at 311 n.3 (2003).

[8] *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).

[9] *Prof'l Eng'rs*, 435 U.S. at

[17] RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 4 cmt. c (2000).

[18] Palomar, supra n. 5 at 520.

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

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contract requirements; and making all logistical arrangements for closings.[22] CRESPA requires anyone (incl.0000 0n0000 cm0.00 0.000.0012.0000 0.0000 TD(e ij9.3600 0.0000 TD(ce)g lawy31.6800 0.0000 TI

[22] *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.

[23] 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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United States Department of Justice
Antitrust Division

By direction of the
Federal Trade Commission,

William E. Kovacic
Chairman

Maureen K. Ohlhausen
Director
Office of Policy Planning