UNITED STATES OF AMERICA

FEDERAL TRADE COMMISSION
Washington, DC 20580

DEPARTMENT OF JUSTICE
Washington, DC 20530

October 6, 2004

Representative Paul Kujawski
House of Representatives
Commonwealth of Massachusetts
State House, Room 174
Boston, MA 02133-1054

Dear Rep. Kujawski:

D i r e c t e p .

[1] This letter expresses the views of the FTC's Office of Policy Planning, Bureau of Economics, and Bureau of Competition. The letter does not necessarily represent the views of the Commission or of any individual Commissioner. The Commission has, however, voted to authorize us to submit these comments.

[2] Letter from Rep. Paul Kujawski to Todd Zywicki, Director, Office of Policy Planning (June 29, 2004).

- Competition produces lower prices, as well as better goods and services. Absent evidence that restrictions on competition are necessary to protect consumers, policy makers should not deprive consumers of the benefits that flow from competition.
- Allowing non-attorneys to compete with attorneys in the provision of settlement services is likely to provide Massachusetts consumers with lower prices for settlement services, whether provided by a title company or an attorney. HB 180, moreover, would benefit consumers by improving their ability to choose their preferred mix of cost, convenience, and quality.
- Other state supreme court decisions and scholarly studies that have addressed the topic suggest that allowing non-attorneys to perform settlement services is not likely to subject Massachusetts consumers to any additional risk of harm.

I. The Interest and Experience of the Federal Trade Commission and Department of Justice

The FTC is charged by statute with preventing unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.[3] The United States Department of Justice has been entrusted with enforcing this nation's antitrust laws for over 100 years, since the passage of the Sherman Antitrust Act. The FTC and Justice Department work to promote free and unfettered competition in all sectors of the American economy. As the United States Supreme Court has observed, "[t]he heart of our national economic policy long has been faith in the value of competition."[4]

Consistent with their mission to protect consumers, the Justice Department and FTC have become increasingly concerned about efforts to prevent non-lawyers from competing with attorneys in the provision of certain services through the issuance of opinions by state bar agencies and the adoption of laws and regulations by state courts and legislatures relating to the unauthorized practice of law. Through letters and amicus curiae briefs, the FTC and Justice Department have urged the American Bar Association, Virginia, Rhode Island, Kentucky, North Carolina, Georgia, West Virginia and Ohio to reject such restrictions on competition between attorneys and non-attorneys.[5] Separately, the Department of Justice has brought suits for

[3] Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

[4] *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) (citing *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951)).

[5] Letter from the Justice Department and the FTC to Standing Committee on the Unlicensed Practice of Law, State Bar of Georgia (Mar. 20, 2003); letters from the Justice Department to Speaker of the Rhode Island House of Representatives and to the President of the Rhode Island Senate, *et al*. (June 30, 2003 and Mar. 28, 2003); letter from the Justice Department and the FTC to Task Force on the Model Definition of the Practice of Law, American Bar Association (Dec. 20, 2002); letter from the Justice Department and the FTC to Speaker of the Rhode Island House of Representatives, *et al*. (Mar. 29, 2002); letter from the Justice Department and the FTC to President of the North Carolina State Bar (July 11, 2002); letter from the Justice Department and the FTC to Ethics Committee of the North Carolina State Bar (Dec. 14, 2001); letter from the Justice Department to Board of Governors of the Kentucky Bar Association (June 10, 1999 and Sept. 10, 1997), available at http://www.usdoj.gov/atr/public/comments/comments.htm; 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 Federal Trade Commission in *Cleveland Bar Association v. CompManagement, Inc*., No. 04-0817 (filed Aug. 3, 2004), available at http://www.ftc.gov/os/2004/08/040803amicusbriefclevbar.pdf**;** Brief *Amicus Curiae* of the United States of America and the Federal Trade Commission in

1. Evaluating title to real estate to determine the interest created, transferred or terminated and communicating that evaluation to any interested party to a residential real estate transaction.
2. Evaluating and ensuring that parties to a real estate transaction have complied with their agreements.
3. Preparing, drafting or reviewing legal documents that affect title to real estate or affect the obligation of the parties to the real estate transactions.
4. Explaining at the closing any docum t.S. at 695 (.15 TD0.009 Tc to thebe.7iothe interest cr, transf -0.000

[9] *Id*. at *24-25.

[10] *Id*. at *23-24.

[11] HB 180.

[12] *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 695 (citation omitted).

provided by the "learned professions" are no different from the benefits derived from competition in manufacturing and service industries.[13] When non-lawyers are permitted to compete with lawyers to provide real estate services, consumers are able to choose for themselves their preferred mix of cost, convenience, and the degree of assurance that the service is performed adequately. Indeed,

> [t]he 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.[14]

In a majority of states, non-lawyers compete with lawyers to provide services related to the preparation and execution of a deed, including 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.[15]

A. Competition between non-attorneys and attorneys in the provision of real estate settlement services will benefit consumers

HB 180 will allow Massachusetts consumers to hire non-attorneys to perform settlement services. This increase in competition is likely to benefit consumers in a variety of ways.

First, HB 180 would benefit consumers who, but for the current restrictions on non-attorneys, would choose to hire non-attorneys to perform settlement services. These consumers currently are unable to choose the combination of price, quality, and service that they prefer. For example, lay settlement services have operated in Virginia since 1981, when the state rejected a proposed bar opinion declaring lay settlements to be the unauthorized practice of law. In 1997, Virginia codified the right of consumers to continue using lay settlement services by enacting the Consumer Real Estate Settlement Protection Act.[16] Proponents of that enactment pointed to survey evidence suggesting that lay settlements – including title examinations – in Virginia were substantially less expensive than attorney settlements:

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[13] *See id.* at 689; *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975).

[14] *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 695; *accord FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 423 (1990).

[15] *See, e.g.*, Joyce Palomar, *The War Between Attorneys & Lay Conveyancers – Empirical Evidence Says "Cease Fire!,"* 31 CONN. L. REV. 423, 487-88 (1999) (noting that there are more states in which non-attorneys perform 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).

[16] VA. CODE ANN. §§ 6.1-2.19 to 6.1-2.29 (Michie 2003).

[17] Media General, *Residential Real Estate Closing Cost Survey*, at 5 (Sept. 1996).

[18] *See Perkins v. CTX Mortgage Co.*

much as 1% of the loan amount plus additional fees."[20] Further, the court noted that "the presence of title companies encourages attorneys to work more cost-effectively."[21]

Third, HB 180 is likely to encourage competition from out-of-state lenders and title companies. Lenders outside of Massachusetts – such as online lenders – that compete with in-state lenders for Massachusetts consumers' business may lack facilities in Massachusetts. Instead, these lenders may hire out-of-state providers to prepare deeds and may contract with lay providers in Massachusetts to facilitate the closing of the real estate transaction. By helping facilitate competition among lenders, HB 180 can lead to the availability of lower loan rates for Massachusetts consumers. Further, to the extent that HB 180 encourages competition from online lenders, Massachusetts consumers who value the convenience of conducting their entire loan application and approval process via the Internet also will benefit.

B. HB 180 is unlikely to result in any consumer harm

Courts and scholars that have examined the issue have found scant evidence that allowing non-attorneys to perform settlement functions results in consumer harm. For example, opponents of allowing lay settlements often express a concern that buyers and sellers will have questions about the transaction and the documents that a lay settlement provider cannot or should not answer.[22] However, with regard to the Kentucky Bar's assertion that attorneys need to be present at closing to answer legal questions, the Kentucky Supreme Court found that "few, if any, significant legal questions arise at most residential closings."[23] Further, with regard to a list of questions the Kentucky Bar alleged were likely to arise at closing, the court noted that "most of the witnesses conceded that questions of the nature of those [questions] listed . . . are asked, if ever, before the closing, when there is time to resolve any problems."[24] Other state

[20] *Countrywide Home Loans, Inc. v. Kentucky Bar Ass'n*, 113 S.W.3d 105, 120 (Ky. 2003).

[21] *Id*.

[22] *See, e.g., Mass. Conveyancers*, 2001 Mass. Super. LEXIS 431 at *20-21.

[23] *Countrywide Home Loans*, 113 S.W.3d at 119.

[24] *Id*.

courts that have considered this issue also have found no evidence of consumer harm from lay settlement services,[25] and we are aware of no case to the contrary.[26]

Scholarship also supports the conclusion that consumers face no additional risk of harm

[25] *See Perkins*, 969 P.2d at 100 ("[T]he risk of public harm is low. Indeed, the Perkinses have never alleged that their loan documents were deficiently drafted or that their legal rights were prejudiced in the least."); *In re Op. No. 26*, 654 A.2d at 1346 ("The record fails to demonstrate that the public interest has been disserved by the South Jersey practice [of allowing non-attorneys to perform settlement services, including title examinations and closings] over the many years it has been in existence."); *Guardian Abstract & Title*, 575 P.2d at 949 (in county where title companies handled approximately 90 percent of the real estate closings and had been performing service for 20 years, "[t]here was no convincing evidence that the massive changeover in the performance of this service from attorneys to the title companies during the past several years has been accompanied by any great loss, detriment or inconvenience to the public"); *Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n*, 312 P.2d 998, 1007 (Colo. 1957) ("we must make note of the fact that the record is devoid of evidence of any instance in which the public or any member thereof, layman or lawyer has suffered injury by reason of the act of any of the defendants sought to be enjoined").

[26] Although the Georgia Supreme Court recently held that real estate closings are the practice of law, it reached its conclusion without any analysis of the benefits or costs to the public of such a prohibition. *In re UPL Advisory Opinion 2003-2*, 588 S.E.2d 741 (Ga. 2003). Instead, the court merely asserted that prohibiting lay closings was in the public interest. *Id.* at 742. Nor do other states' decisions to prohibit lay settlement services contain any evidence that non-attorneys are any more likely than attorneys to harm consumers with shoddy or dishonest service. *See, e.g.*, *Ex parte Watson*, 589 S.E.2d 760 (S.C. 2003); *Doe v. McMaster*, 585 S.E.2d 773 (S.C. 2003); *Mass. Conveyancers Ass'n*, *supra*; *In re Mid-Atl. Settlement Servs., Inc*., 755 A.2d 389 (Del. 2000) (unpublished op.); *State v. Buyers Serv. Co., Inc*., 357 S.E.2d 15 (S.C. 1987).

[27] Palomar, 31 CONN. L. REV. at 477 (emphasis added).

[28] *Id*. at 520; *accord* Braunstein, 62 MO. L. REV. at 274-75 (discussing a 1989 Ohio study that "indicate[d] that increased lawyer involvement does not have a beneficial effect on outcomes of home purchase transactions").

IV. Conclusion

By allowing non-attorneys to compete with attorneys in the provision of settlement services, HB 180 is likely to provide Massachusetts consumers with lower prices, greater convenience, and increased choice. At the same time, HB 180 is unlikely to cause Massachusetts consumers to suffer any additional risk of harm. The Justice Department and FTC staff appreciate this opportunity to present our views and would be pleased to address any questions or comments regarding our analysis.

Respectfully submitted,

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